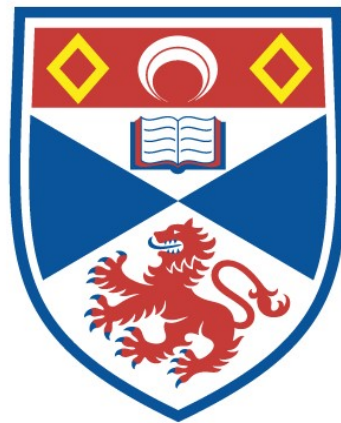


RESOLVING THE POST-ELECTION VIOLENCE AND
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THROUGH POWER SHARING: POWER AND IDEOLOGY IN
KENYA'S QUEST FOR JUSTICE AND RECONCILIATION: A
JUSTICE WITHOUT PUNISHMENT?

Azman, Muhammad Danial

A Thesis Submitted for the Degree of PhD
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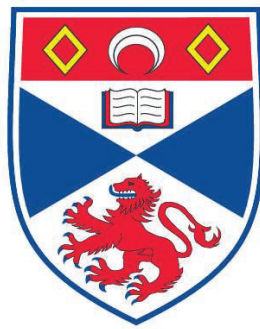
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Resolving the Post-Election Violence and
Developing Transitional Justice Institutions through
Power Sharing: Power and Ideology in Kenya's
Quest for Justice and Reconciliation – A Justice
without Punishment?

Muhammad Danial Azman



This thesis is submitted in partial fulfilment for the degree of
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at the
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24th June 2014

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September 2013
Muhammad Danial Bin Azman
School of International Relations

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Project Title:	Sustainable Reconciliation: Transitional Justice Challenges in Kenya
Researchers Name(s):	Muhammad Danial Bin Azman
Supervisor(s):	Professor Ian Taylor

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AZMAN

University of St Andrews

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Name of Person(s) travelling: Muhammad Danial Azman

Location: Cape Town South Africa, Cairo, Egypt, Nairobi and Rift Valley, Kenya, Addis Ababa, Ethiopia.

Description of Fieldwork

Conducting semi-structure interviews with politicians, former diplomats, and academicians and human rights lawyers in Cairo, Cape Town, Nairobi and Addis Ababa. Conducting semi-structure interviews with the Internal Displaced Persons (IDPs) in Rift Valley and Nairobi.

Dates of travel

22-25 July 2011 (Egypt)

12-19 July 2011 (South Africa)

28 January 2012 – 20 April 2012 (Kenya and Ethiopia)

27 February 2013 – 15 April 2013 (Kenya)

Foreseeable Risks

For information about the country to be visited you should check the FCO website <http://www.fco.gov.uk> and attach a printout to this form.

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Hazards of Visiting Country (as identified by FCO website)

I have sorted a clarification regarding the visa, entrance and conducting a fieldwork with the Immigration Department of the said countries. I do not face any serious difficulties in term of permissions to travel, immigration clearance, and I do not require any permit for fieldwork.

Hazards of Fieldwork Activities

The primary concern is the process of conducting interview while interacting and engaging with the 160 IDPs in Kenya due to their vulnerabilities and living conditions.

Control Measures to Eliminate or Minimise the Risks of the Above Hazards

To protect their safeties from political repercussions, I have decided not to identify and mention their actual identities in my thesis and I have forward them the example of the interview transcripts which they are happy with they way I have protected their actual identities. I have ensured that only 21 years old of male and female adults are involved in my interviews and informal conversations through 10 months that divided in two parts of fieldwork visits. They are keen to share their stories and perspectives. The similar method of research in a vulnerable fieldwork zone that I conducted have been adopted in few of the secondary literatures that I cited in my thesis, Susan Thomson, 'Whispering Truth to Power: The Everyday Resistance of the Rwandan Peasants to Post-Genocide Reconciliation,' *African Affairs*, Vol. 110, 2011, pp.439-456 and James Scott, *Seeing like a State*, New Haven: Yale University Press, 1999.

The risks that remain after all reasonably practicable control measures have been implemented, that is the **residual risks**, should be estimated and entered into the table below (see guidance notes).

Hazards as Detailed Above	Risk <u>AFTER</u> Control Measures have been Implemented (Residual Risk on scale 1-36)
Not identifying the respondents identities in my thesis	1
Only interviewed 21 years old male and female adults (IDPs)	1

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Principal Researcher or Postgraduate Supervisor

I am satisfied that all foreseeable significant hazards associated with the fieldwork have been identified and that the related risks are adequately controlled.

Name TAYLOR Signature Date 14/5/14

Approval of the Fieldwork by the Head of School

I hereby approve this fieldwork.

Name Signature 27/5/14 Date

OR

I am **not** satisfied that all foreseeable risks are adequately controlled and I am submitting this risk assessment to the University Fieldwork Sub-Committee for University Approval (See guidance notes).

Name Signature Date

For Completion by the University Fieldwork Sub-Committee

The University Fieldwork Sub-Committee **approves / does not approve** this fieldwork project

Name Signature Date

(Signed by the Convenor, or nominated person, on behalf of the University Fieldwork Sub-Committee).

7.4.2006



University of St Andrews

School of International Relations

Muhammad Danial Azman
The School of International Relations
University of St Andrews

10th June 2014

Dear Danial,

On behalf of the Postgraduate Committee I would like to thank you for submitting your material for the annual progress review. I am sorry for the difficulties that you have been facing .

The committee is pleased with your commitment to the project and your supervisor's report on your progress.

With our best wishes for your research.

Yours sincerely,

Dr Gabriella Slomp
Director of Postgraduate Studies (Research)
Convenor, Postgraduate Committee

Cc: Supervisors (Professor Taylor)



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The School of International Relations
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The Committee were pleased by your progress, reports and our discussion with you. I am happy to inform you that on the basis of your meeting with us, your research proposal and the recommendations of your supervisor, the Committee will recommend that you be re-registered as a PhD research student.

Yours sincerely,

Dr Patrick Hayden
Director of Postgraduate Studies
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Cc: Supervisor (Prof Ian Taylor)

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Map of Africa



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Acknowledgments

This doctorate thesis is the result of four years of research; it began as a masters dissertation at the University of Bradford and the University of Nottingham, England, and developed into a doctoral thesis at the University of St. Andrews, Scotland, between 2009 and 2013. It draws on the support and advice of more individuals than can be wisely acknowledged here.

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(Edinburgh), Donald (Aberdeen), Natalie (Glasgow), Steve (Highlands), Sam (Dublin) and Jonathan (Manchester).

Abstract

Since February 2008, the Kenyan government and society have been the focus of continued debate and sustained criticism from the global human rights and transitional justice community concerning the authenticity of the multiple transitional justice mechanisms that have been implemented in the country. Drawing from more than four years of fieldwork in Kenya and nearly 160 interviews with major Kenyan policymakers, Internally Displaced Persons (IDPs), local and international NGOs, public intellectuals, retired judges, international legal commentators and human rights advocates in Addis Ababa, Cape Town, Geneva, London, Paris, and The Hague, this thesis identifies the political logic behind the justice-and reconciliation-seeking policy initiated by the Kenyan National Dialogue and Reconciliation (KNDR) policy.

In its consideration of the complexity of defining and executing justice and reconciliation in the aftermath of the 2008 crisis in Kenya, this thesis attempts to explain how the continuing effort to increase democratisation and implement reforms following the post-election violence has inaugurated the use of a new language of transitional justice policy. It argues that such precarious trends present more instructive opportunities for—as well as obstructions to—international engagements in Kenya.

Revisiting the reflections of Critical Peacebuilding Scholarship (CPS) and Critical Legal Studies (CLS) on the administration of justice, this thesis suggests that the interaction between transitional justice and liberal peacebuilding exhibits a precarious condition for navigating law and politics in post-conflict reconstruction studies. However, it also suggests that the success of this interaction depends on the ability of

the international society to understand that a liberal cosmopolitan conviction of justice, peace, reconciliation, accountability and mitigating impunity via the International Criminal Court (ICC) and the national Truth, Justice and Reconciliation Commission (TJRC) has not addressed the needs of the victims or succeeded in combating the infamous legacy of impunity in Kenyan politics. The utilitarian approach to understanding retributive and restorative theories of transitional justice is inimical and univariate, and excludes the local political contingency of Kenyan history. Consequently, it fails to provide a sound understanding of the power relations and ideological apparatus of the ICC and TJRC in the neo-patrimonial logic of Kenyan politics.

Drawing on Michel Foucault's theory of power and Louis Althusser's theory of ideology, this thesis suggests that the IDPs' needs for justice and reconciliation are not satisfied by the solutions prescribed by international policymakers and the Kenyan ruling class. This thesis concludes that further attempts to empower the IDPs through transitional justice mechanisms have suffered from the overwhelming politicisation of justice in Kenya and the call for a greater recognition of the logic of neo-patrimonialism in policing justice in Kenya. By recognising the transitional justice mechanisms' inability to resolve 'everything', or to implement a one-size-fits-all policy of liberal peace in Kenya's recent democratic crisis, this thesis illustrates how the IDPs used everyday acts of resistance as a mode of survival. It also shows how the ICC's intervention and the release of the TJRC report have made the environments in which the IDPs live more hostile and difficult, which has hindered the process of normalising and reintegrating them back into society. Challenging the narrative of peaceful 2013 elections in Kenya and demystifying the successful political

reconciliation that Kenya's Government of National Unity (GNU) claims to have effected, this thesis reveals how the ICC and TJRC have become forms of disciplinary technology and ideological apparatus with which the ruling class disenfranchises and marginalises the IDPs, and keeps the "hidden transcript" regarding state, law and politics away from the eyes of the ordinary populace.

Abbreviations

ANC	African National Congress, South Africa
AU	Africa Union
BIEA	British Institute for Eastern Africa
BISA	British International Studies Association
CLS	Critical Legal Studies
CPCS	Centre for Peace and Conflict Studies, University of St Andrews
CPS	Critical Peace Scholarship
CSR	Corporate and Social Responsibilities
DRC	Democratic Republic of Congo
ECK	Electoral Commission of Kenya
EU	European Union
FORD	Forum for Restoration of Democracy, Kenya
GNU	Government of National Unity, Kenya
ICC	International Criminal Court
ICCPR	International Covenants on Civil and Political Rights
ICESCR	International Covenants on Economics, Social and Cultural Rights
ICL	International Criminal Law
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Republic of Yugoslavia
IDPs	Internal Displaced Person(s)
IFIs	International Financial Institution(s)
IJR	Institute for Justice and Reconciliation, South Africa
IPSA	International Political Science Association
IR	International Relations
ISA	Ideological State Apparatus
KADU	Kenyan African Democratic Union
KAF	Kofi Annan Foundation
KANU	Kenyan Africa Union
KNDR	Kenyan National Dialogue and Reconciliation
KNHRC	Kenyan National Human Rights Commission
LAPSSET	Lamu Port-South Sudan-Ethiopia Transit Corridor
LRA	Lord Resistance Army, Uganda
MNCs	Multinational Companies(s)
MOF	Ministry of Finance
MPs	Members of Parliament
NARC	National Rainbow Coalition, Kenya
NGOs	Non-Governmental Organisation(s)
NP	National Party, South Africa
NPI	Nairobi Peace Initiative
ODM	Orange Democratic Movement, Kenya
OTP	Office of the Prosecutor of the International Criminal Court
PNU	Party of National Unity, Kenya
R2P	Responsibility to Protect
RAS	Royal African Society, United Kingdom
RPF	Rwandan Patriotic Front

RSA	Repressive State Apparatus
SAPs	Structural Adjustment Policies(s)
SCSL	Special Court for Sierra Leone
SLDF	Sabaot Land Defense Force, Kenya
STL	Special Tribunal for Lebanon
TJ	Transitional Justice
TJRC	Truth, Justice and Reconciliation Commission
TRC	Truth-seeking Commission, Truth and Reconciliation Commission
UCDP	The Uppsala Conflict Database Programme
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNAMIR	United Nations Assistance Missions for Rwanda
UNSC	United Nations Security Council
US	United States

Glossaries

<i>Al-Shabaab</i>	Literally translated from Arabic as ‘The Youth’. A multiethnic and transnational terrorist group that currently based in the Horn of Africa and widely claimed by the Kenyan government to have a direct connection with <i>Al-Qaeda</i> (Muthoni, 2011: p.157).
<i>Gacaca</i>	A neo-traditional or socio-legal mechanism that was adopted by the Rwandan government as employed as a form of transitional justice (Clark, 2011b: p.5).
<i>Kipande</i>	A form of identity document introduced by the Colonial Office in Kenya. The Native Registration Amendment Ordinance of 1920 introduced by the British government made the card compulsory for African males above the age of 15, which restricted the people’s mobility (Anderson, 2005: p.15).
<i>Majimbo</i>	A Swahili term that is widely associated with national debates on decentralization or devolution. The word became commonplace in the political arena around the time of independence and the first election (Anderson, 2010: p.23).
<i>Matatu</i>	A popular private mini bus or van in Kenya. The term is widely used in Swahili-speaking countries. The etymological root of the name is a Swahili colloquialism with many definitions. Popular among them referred to the actual cost of a ticket, which was <i>matatu</i> or 30 cents (Ogonda, 1992: p.17).
<i>Mau Mau</i>	The origin of the term is highly contested, as the first generation of <i>Mau Mau</i> fighters never referred themselves as such. <i>Mau Mau</i> uprising occurred during the emergency period (1952-1960), which saw the Kikuyu and other landless minorities against the colonial oppressive land polices and British military rule in East Africa. Besides failing to win the supports of other communities, they also suffered betrayal at the hand of rich Kikuyus. Their efforts were also undermined by the ruling elite of President Jomo Kenyatta’s regime, who inherited the immediate period of post-colonial state (Branch, 2009: p.10)
<i>Mungiki</i>	A criminal group that was banned by the Kenyan government. It has become systematically organised by late 1980s. It claims tracing its roots to <i>Mau Mau</i> fighters though this claimed is highly contested. The group represents a modern symbol of the rejection of Westernization and anything that is perceived to be foreign. They operated as part of the ‘shadow world’ and perform vigilante functions (Kagwanja, 2003: p.26).

<i>Nunca Mas</i>	A Latin termed, meaning ‘Never Again’ and used by the Argentinian National Commission on the Disappearance of Persons; later popularised in global TJ literature (Crenzel, 2011: p.15).
<i>Wananchi</i>	<i>Swahili</i> terms for ‘members of public’ or ‘ordinary people’.
<i>Harambee</i>	Literally translated as communal works or ‘let’s pull out together’, it also used as a figurative expression for collective rights, welfare and wealth distribution. Popularised during the reign of Kenyatta. It was used to refer to specific neo-patrimonial practices in Kenya, with which the ruling elite obtained grassroots supports from the local community by providing immediate financial support to citizens as a reward for their votes (Widner, 1992: p.7).

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Chapter 1: Thesis Framework and Research Methodology

A – Introduction

On the day after the Electoral Commission of Kenya's announcement that Mwai Kibaki, from the Party of National Unity (PNU), had won the presidential seat, a 37-year-old priest from the Luo community received information that there had been a sudden outbreak of violence in the town of Londiani. The frustration of the Orange Democratic Movement's (ODM) supporters had exploded when it was confirmed that Kibaki would be re-elected as Kenya's president. For them, the injustice of a stolen election had to be fought with arrows and machetes.

As the priest was heading back to his house from a nearby shop, he stopped at a junction where a number of Luo and Kalenjin youths had gathered. One of them chanted: *Sasa tunaenda kuchukua silaha tuanze kazi*, ('we are now going to collect weapons to start work'). As they were beginning to become out of control, the priest walked towards the nearby village, inhabited mostly by Kibaki voters. Here the priest tried to reason with Luo and Kalenjin youths, by calling for restraint. They simply answered that their votes had been stolen, and that the Kikuyus had long denied them the wealth that was due to them. He then asked one of the women present why she was encouraging her son and relatives to attack the Kikuyus' village; she replied, 'Why are you stopping these young men of your own Luo blood, from attacking the Kikuyus, even though they have been denying us for a very long time?'. As the priest tried to call the police from his mobile phone, the woman started throwing stones at him and accused him of being a traitor to his own community. As he belonged to the same ethnic community as the women, the priest was faced with a dilemma: should he

stop them from slaughtering the Kikuyus, or should he allow them to seek vengeance following for their stolen votes? Despite his brief intervention, the entire Kikuyus village in Londiani was burned to the ground that night.

The priest's story¹ is just one of thousands of personal narratives relating to the violence that occurred during the 2007 election in Kenya (see also Njogu, 2009). In the face of extreme social devastation, Kenyans faced many dilemmas similar to that of the priest in responding to the violence; between seeking justice for a community on the one hand, and peace for the other communities on the other hand (Makokha and Opondo, 2008: p.16). The above narratives recall the traumatic memory of the conflicting desire for both justice and peace among various ethnic communities during the period of post-election violence. This is the latest phase in a cycle of violence that has recurred throughout Kenya's recent history (Adebanwi and Obadare, 2011; Kossler, 2008; Schaller, 2008). The electoral violence significantly reversed the progress of Kenya and many other of Africa's 'new democracies'², and the crisis nearly reached the same scale as that which resulted in genocide in Rwanda (Schaller, 2008: p.341). While competitive elections have been par for the course in African politics for two decades, the spiral effect of the violence of this particular election radically undermined the democratic process (Mueller, 2011: p.100). It reversed much of the democratic progress hitherto made and threatened the on-going attempt to cultivate a peaceful political practice between the plural societies of African nations

¹ The above is a depiction of the anecdote of one of the survivors of the post-election violence; he voluntarily shared his story during the author's first visit to the IDP' camps in 2009. However, the individual has been given a surrogate name by the author (interview with IDP no. 8, Rift Valley, February 24, 2009).

² The term 'new democracies' has been used to describe the electoral processes of the different African countries since the 1990s. Despite being based on a strong desire for greater democratisation and a rejection of authoritarian politics, the electoral practices were characterised by unreliable electoral management and disputes, which sometime became violent. This had a markedly detrimental effect on the consolidation of democracy. See Ake, 1996; Bratton and Walle, 1997; Omotola, 2008.

(Opitz et al., 2013: p.715; Orji, 2013: p.394). While the literature concerning political violence asserts that there had been a significant decrease in instances of military rule, and armed insurgencies by the end of the Cold War (Elbadawi and Sambanis, 2000; Gleditsch et al., 2002; Henderson and Singer, 2000; Karbo, 2008; Reno, 1999), the return of multiparty elections have contributed to a recent trend towards the outbreak of violence in Africa's democracies (Abuya, 2010; Cowen, 2002; Laakso and Cowen, 2002; Morse, 2012).

In its contribution to these outbreaks of violence, the democratic crisis in Kenya underscores many wider concerns about the tendencies of international and regional actors to resolve election disputes by using the liberal peace model of power-sharing as a means of providing crisis management, humanitarian intervention and transitional justice (Kagwanja and Southall, 2010: p.7). In this case, the liberal peace model of crisis management was used to address the similar dilemmas of Zimbabwe (Boone and Kriger, 2010), Nigeria (Larémont, 2010), Uganda (Conroy-Krutz and Logan, 2012), Mali (Ahluwalia, 2013), Ivory Coast (Lokongo, 2012) and Libya (Çubukçu, 2013).

This liberal peace model of democratisation and its shortcomings are worthy of consideration for several reasons. Firstly, most of the recent instances of political violence in Kenya were democracy-related. Consequently, this has reinvigorated the long-running debate on the crisis of legitimacy, and has questioned the post-colonial state's ability to resist threats (Herbst, 1989; 2000a; 2009; Ndlovu-Gatsheni, 2013). Secondly, the power-sharing and transitional justice policies that have been implemented in Kenya and other African countries ignore these countries' shared

practice of patronage politics (Bayart, 2009; Clapham, 1996; Hyden and Colin, 1972; 2006). Thirdly, the adoption of this model of liberal peace and transitional justice is a repetition of the mistakes of implementing the Structural Adjustment Policy (SAP) template, which does not address one of the main causes of the crisis itself: neo-patrimonialism (Abrahamsen and Williams, 2011; Curtis, 2013; Samuelson and Musila, 2011; Vambe and Zegeye, 2012). Finally, the democratic process and the continuous circulation of power among various members of the African ruling elite provided the marginalised groups (and other opposition movements who had hitherto lived in the peripheral spaces of the state and suffered gross violations of human rights) to redefine their positions through a vocabulary of justice, accountability and sanction (Kiwuwa, 2013: p.263).

Specifically, with the commentator's concern about the increasingly hostile reception of the ICC in Africa, and the recent accounts of *Al-Shabaab's* terror in Nairobi, the campaigning of opposition movements for victims' access to justice has triggered the rise of legalist discourse and an increased application of the politics of justice in recent election disputes. In her observation of the ICC intervention in the Ivory Coast, Giulia Piccolino examines the relationship between a legalist discourse of rights and the politico-military crisis that arose after President Laurent Gbagbo seized power (2014: p.62). Gbagbo's heavy reliance on a language of justice and the opposition-driven, legalist discourse of democratisation is mainly owing to Alassane Ouattara's failure to atone for decades of economic disparity, rights violations and political impunity (2011: p.21). Accordingly, the more violations that were perpetrated by those in power, the more the opposition and the agents of international intervention employed a legal discourse of violation and reparation (2011: p.65).

In the aftermath of the post-election violence in Kenya, the admission of the Kenyan case to the ICC served to catalyse international intervention through the use of the legalist discourses of transitional justice and the politics of reconciliation (Sriram. and Brown, 2012: p.240). In the literature of transitional justice, it is gradually being acknowledged that the limited success of attempts to utilise post-conflict justice mechanisms in South Africa, Sierra Leone and Rwanda has confirmed the need for a more flexible methodology in the theory and practice of international relations. These cases also call for a clearer understanding that the act of implementing transitional justice policy is more than simply a discreet legal process and requires a heightened degree of political analysis in order to be successful (Clark, 2012b; Clark, 2010; Kelsall, 2009).

The shortcomings of the existing literature on transitional justice are owing to a lack of focus on the current interplay between politics and law; analytically, the role of this interplay in securing some forms of justice of reconciliation has not yet been fully grasped (Thomson and Nagy, 2011). With the ICC's recent, simultaneous waging of judicial and political battles in many African countries, the growth of in-depth research publications and critical reflections on transitional justice has mushroomed. Although many of these publications are rich in empirical findings, few have succeeded in conducting clear theoretical investigations; rather, many have rephrased similar, pre-existing Critical Legal Studies (CLS) perspectives on the interplay between law and politics (Buckley-Zistel et al., 2014; Sriram et al., 2013). In particular, within the growing concerns of international thought and practice, what remains puzzling is the question of how the proliferation of transitional justice options

compares against the actual reality of administering international justice. A further unresolved issue is the question of how the fluidity of intersection between transitional justice and liberal peacebuilding affects to the existing positions of scholars of Critical Legal Studies on the interplay between politics and law.

This thesis recognises the need to bridge such gaps in the literature of transitional justice, and uses the ongoing situation in Kenya as a framework within which to position the country's transitional justice institution within the broader constellation of law and politics. In the process, this thesis provides some critical reflections on the Kenya situation in order to gain some new footholds in transitional justice theory. For example, the extent of the manipulation of the language of justice by the political elite is underestimated in the literature on Kenyan politics (Brown, 2013; Hansen, 2010a; 2010b; 2011c; 2011d; 2013a; 2013b). The victims' demands for justice and reparation were manipulated by the political elite, and the victims' needs for justice remained unaddressed (interview with University of Nairobi's lecturer no. 1, Nairobi, March 18, 2009). This serves to create circumstances ripe for future outbreaks of violence rather than for the resolution of existing troubles (Greiner, 2013; Lynch and Anderson, 2013; LeBas, 2013; Mati, 2013). Hence, the detrimental effect of this electoral violence upon the development and refinement of transitional justice and the prevention of political violence deserves a lengthy investigation, since it is characterised by 'continuous ambiguity' (interview with US International University's lecturer no. 3, Nairobi, March 23, 2009).

'Continuous ambiguity' here refers to a prolonged state of confusion or contestation surrounding the cause of the conflict; mediation and resolution after the violence

period became inextricably associated with what was perceived to be a regressive outcome, and continuously impeded the justice- and reconciliation-seeking policy that later came into play when both commentators and policymakers started to construct viable and legitimate claims of accountabilities for mass atrocities against certain parties (see Nicolli, 2008; Zartman and Kremenjuk, 2005).

Equally important is the ambiguity concerning the violence itself, in that there is now a conflicting desire for both peace and justice in the wake of the electoral violence (interview with IDP no. 7, Rift Valley, February 23, 2009). Different communities' attachments to collective (and constructed) primordial cleavages in Kenya reproduced a fictional divide between contested identity and group categorisation (Lynch, 2011c: p.400). If the fluidity of identity is a 'modern invention' (in which an individual claims himself to be a 'son of the soils') and results from what John Lonsdale terms as 'autochthony' or 'a political strategy rather than historical fact', the post-election violence that revolved around politics of belonging could not have simply appeared uniquely as a result of global repercussions of the 1990s elections that swept through Africa; rather it is a consequence of the vulnerability imposed on these communities by the existing disparities, economic inequalities, negative ethnicities and ferocious patronage struggles between the favored barons in their attempts to tighten their grip on the state (Lonsdale, 2008: p.310). 'It is not to guard against some existential global threat that African[s] expel stranger neighbors from their local community...rather, [it is] against, the daily inequalities...by which [the] states decide who is to gain...and who [to] bear [the] cost' (pp.310-11). What remains pertinent is how autochthonous behavior reinforced Kenyans' exclusive sense of belonging, and imposed a

continuous sense of ambiguity that reversed democratic progress and perpetuated further injustices (Interview with IJR officer, Cape Town, July 15, 2011).

Stories like that of the priest and his dilemma—whether to take the side of his community or of another group during the violent period—have not only confirmed Lonsdale’s critical assertion concerning the political function of primordial attachments in mobilising support, orchestrating violence and claiming human rights; more importantly, they have challenged the simple and criminal binary dichotomy between victim and perpetrator based on this notion of fluid identity. This dichotomy had a seriously obstructive effect on the justice- and reconciliation-seeking policy that was implemented following the power-sharing agreement between President Mwai Kibaki and Prime Minister Rahila Odinga in 2008 (see Table 1.1). After all, the debate on justice, accountability, peace and reconciliation after the intensified period of election violence and the model of crisis management in Kenya has been ‘exported’ to similar hybrid democracies, such as Zimbabwe, Nigeria, Uganda, Ethiopia, Mali and the Ivory Coast (Straus, 2012: p.15). Kenya is one of the few hybrid democracies in which the electoral processes have been accompanied by recurring outbreaks of violence followed by intense but overly ambitious attempts to address these outbreaks with reform and justice (interview with CIC officer no. 1, Nairobi, February 7, 2012). For this reason and other outlined below Kenya has been selected as the main case study for this thesis.

Table 1.1: Agreement on the Principle of Partnership (Power Sharing)
Acting together for Kenya: Agreement on the Principles of Partnership of the Coalition Government
Preamble The crisis triggered by the 2007 disputed presidential election has brought to the surface deep-seated and long-standing divisions within Kenyan society. If left unaddressed,

these divisions threaten the very existence of Kenya as a unified country. The Kenyan people are now looking to their leaders to ensure that their country will not be lost.

Given the current situation, neither side can realistically govern the country without the other. There must be real power-sharing to move the country forward and begin the healing and reconciliation processes.

With this agreement, we are stepping forward together, as political leaders, to overcome the current crisis and to set the country on a new path. As partners in a coalition government, we commit ourselves to work together in good faith as true partners, through constant consultation and willingness to compromise.

This agreement is designed to create an environment conducive to such a partnership and to build mutual trust and confidence. It is not about creating positions that reward individuals. It seeks to enable Kenya's political leaders to look beyond partisan considerations with a view to promoting the greater interests of the nation as a whole. It provides the means to implement a coherent and far-reaching reform agenda, to address the fundamental root causes of recurrent conflict, and to create a better, more secure, more prosperous Kenya for all.

To resolve the political crisis, and in the spirit of coalition and partnership, we have agreed to enact the National Accord and Reconciliation Act 2008, whose provisions have been agreed upon their entirely by the parties hereto and a draft copy thereof is appended hereto.

Its key points are:

- There will be a Prime Minister of the Government of Kenya with authority to coordinate and supervise the execution of the functions and affairs of the Government of Kenya.
- The Prime Minister will be an elected member of the National Assembly and the parliamentary leader of the largest party in the National Assembly, or of a coalition, if the largest party does not command majority.
- Each member of the coalition shall nominate one person from the National Assembly to be appointed a Deputy Prime Minister.
- The Cabinet will consist of the President, the Vice-President, the Prime Minister, the two Deputy Prime Ministers and the other Ministers. The removal off any Ministers of the coalition will be subject to consultation and concurrence in writing by the leaders.
- The Prime Minister and Deputy Prime Minister can only be removed if the National Assembly passes a motion of no confidence with a majority vote.
- The composition of the coalition government will at all time take into account the principle of portfolio balance and will reflect their relative parliamentary strength.
- The coalition will be dissolved if the Tenth Parliament is dissolved; or if the parties agree in writing; or if one coalition partner withdraws from the coalition.
- The National Accord and Reconciliation Act shall be entrenched in the Constitution.

Having agreed on the critical issues above, we will now take this process to Parliament. It will be convened at the earliest moment to enact these agreements. This will be in the form of an Act of Parliament ad the necessary amendment to the constitution.

We believe by this step we can together in the spirit of partnership bring peace and prosperity back to the people of Kenya who so richly deserve it.

Agreed this date 28 February 2008

Hon. Rahila Odinga Orange Democratic Movement	Signed By:	H.E. President Mwai Kibaki Government/Party of National Unity
H.E. Kofi Annan H.E. Chairman of the Panel Of Eminent African Personalities	Witnessed By:	President Jakaya Kikwete President of the United Republic of Tanzania and the Chairman of the African Union

Source: (KNDR Secretariat, Niarobi, 2008)

B – Objective and Research Inquiries

This thesis explores the nature of post-conflict attempts to administer transitional justice in Kenya. It focuses in particular on the role of the legal and political institutions that were established in the wake of the 2008 disputes over the presidential election, with specific attention paid to the role of the national Truth, Justice and Reconciliation Commission (TJRC) and the International Criminal Court (ICC). This thesis explores these institutional arrangements through a critical lens, drawing on Michel Foucault’s conception of power and Louis Althusser’s conception of ideology. The thesis’ central argument is that the attempts of these institutions to successfully implement some form of post-conflict justice in Kenya was flawed because they did not take into account how these institutional arrangements were being manipulated by Kenya’s political elite with the aim of reinforcing their power and promoting an ideology that connected them with the global ideological apparatus of post-conflict peacebuilding. The thesis substantiates this claim by focusing on how these institutions failed to address the problems of Internally Displaced Persons (IDPs), whose political subjectivity and agency were denied in the process of imposing these institutional structures.

This thesis draws from an extensive bibliography that has been compiled using sources from legal and political theory, Kenyan politics, Transitional Justice and critical IR theory. This thesis also utilises material that has been mined from 157 interviews with individuals from Kenya, including IDPs and members of the international civil service charged with carrying out the ICC's arrest warrants. The central focus of this thesis is on transitional justice institutions, and measures that are later identified as forms of justice- and reconciliation-seeking policy. Since it is nearly impossible to analyse all of the measures undertaken by the Government of National Unity (GNU) or those which emanated from KNDR's ambitious scope (see Table 1.2), the examination will be limited to two major instruments of justice- and reconciliation-seeking policy, which will later be identified in this thesis as being related to transitional justice mechanisms; the ICC and TJRC. Framing transitional justice in this thesis involves an examination of the Kenyan government's ambitious attempt to resolve the electoral crisis. This attempt later became an ambiguous and controversial case for justice- and reconciliation-seeking policy in Kenya.

Table 1.2: Agenda Item Three – How To Resolve the Political Crisis

**Kenyan National Dialogue and Reconciliation
Mediated by H.E. Kofi Annan and the Panel of Eminent African Personalities
14 February 2008**

I. Preamble:

Reaffirming the Goal of the National Dialogue and Reconciliation.

To ensure that the National Dialogue and Reconciliation is carried out in a continuous and sustained manner towards resolving the political crisis arising from the disputed presidential election results as well as the ensuing violence in Kenya, in line with the agreement between His Excellency Mwai Kibaki and Honorable Raila Odinga, as publicly announced on 24th January and reaffirmed on 29th January 2008 at Country Hall in Nairobi.

The final goal of the National Dialogue and Reconciliation is to achieve sustainable peace, stability, and justice in Kenya through the rule of law and respect for human rights.

Recognising under Agenda Item Three that, in large measure, the current crisis resolves around the issues of power and functioning of state institutions, and also recognising that its resolution may require adjustments to the current constitutional, legal and institutional frameworks, the parties negotiated and agreed on a solution towards

resolving the political crisis arising from the disputed presidential electoral results as well as the ensuing violence in Kenya.

II. Regarding the disputed presidential electoral results, we examined the following options:

(a) Complete Re-count of the Presidential Elections.

We agreed that any re-count, to be considered credible in the eyes of the Kenyan people, would need to be nation-wide, involving a ballot by ballot scrutiny of all of the more than 11,000,000 ballots cast on December 27, 2007. We agreed that all ballots and electoral materials, would have be made available at counting centres across the country before announcing a re-count. A re-count would need to be conducted under the full scrutiny of trained observers and party agents, who would have the right to scrutinize the counting and verify each and every ballot.

We agreed that a re-count would need to be overseen by a special appointed independent body that enjoys the trusts and broad support of all Kenyans. We considered the timeline for a possible re-count. We agreed that the preparatory work required to make a re-count credible in the eyes of the Kenyan people and in keeping with international best practices could take up to three months.

We were concerned that a delay of several months could significantly increase existing tensions and delay resolution of the current crisis, and we recognize that the result of a re-count might not further Kenyan unity, and we therefore decided to review other options.

(b) Re-tally

We agreed that any re-tally, to be considered credible in the eyes of the Kenyan people, would need to be nation-wide, involving full scrutiny and re-tally of results sheets from all of the more than 27,500 polling station tally sheets and 210 constituency tally sheets. We agreed that all forms would have to be made available across the country before announcing the re-tally. A re-tally would need to be conducted under the full scrutiny of trained observers and party agents, who would have the right to scrutinize the conduct of the process and the validity of the each tally sheet, and would need to be overseen by a specially appointed independent body that enjoys the trusts and broad support of all Kenyans.

While we agreed that a re-tally could successfully identify problems or irregularities in the tally sheets, a re-tally could not however identify the correct result in those stations or constituencies where problems or irregularities were identified.

For these reasons, we decided to review other options.

(c) Re-run of President Elections

We were not in agreement on the need for a re-run of the Presidential elections.

We agreed however that, to safeguard the trust and confidence of the Kenyans people in the democratic process, the next election should take place only after the electoral reforms, including but not limited to the reform of the Electoral Commission of Kenya, finalizations of the work of the Independent Review Committee, updating of the Voters' List, establishment and improvement of dispute resolution mechanisms and effecting measures to ensure enfranchisement of Internally Displaced Persons and refugees have

been implemented.

We considered the timeline for these reforms, which would be essential to make the process credible in the eyes of the Kenyans people, and in line with international best practices, would be substantial and would take at least one year.

We recognized that Kenyans could not wait that long for a resolution of the crisis, and we therefore decided to review other options

(d) Judicial Process

We agreed that a judicial process was no longer an option as the legal time limit had expired, and we therefore decided to review other options.

(e) Forensic Audit

We considered a forensic audit of the electoral process. We agreed that an audit would have the advantage of investigating and making findings regarding the conduct of the 2007 election. We agreed that an audit will not reduce tension and violence and will not result in solution to the crisis, and that the legal basis for such an audit was unclear.

We further agreed that the functions of a forensic audit would be best undertaken by an Independent Review Committee

(f) Independent Review Committee

We agree to establish an Independent Review Committee that would be mandated to investigate all aspects of the 2007 Presidential Election and would make findings and recommendations to improve the electoral process.

The committee will be a non-judicial body made up of Kenyan and non-Kenyan recognized electoral experts of the highest professional standing and personal integrity.

The Committee will submit its report within 3-6 months and it should be published within 14 days of submission. The Committee should start its work not later than 15 March 2008.

The findings of the Independent Review Committee must be factored into the comprehensive electoral reforms that are envisaged.

III. Regarding the need for a political settlement to resolve the current crisis, we agree on the following points:

We recognize that there is a serious crisis in the country, we agree a political settlement is necessary to promote national reconciliation and unity.

We also agree that such a political settlement must be one that reconciles and heals the nation and reflects the best interests of all Kenyans. A political settlement is necessary to manage a broad reform agenda and other mechanisms that will address the root causes of the crisis.

Such reforms and mechanisms will comprise, but are not limited to, the following:

- Comprehensive Constitutional reforms

- Comprehensive electoral reform – of the electoral laws, the electoral commission and dispute resolution mechanisms;
- A truth justice and reconciliation commission;
- Identification and prosecution of perpetrators of violence;
- Parliamentary reform;
- Police reform;
- Legal and judicial reforms;
- Commitment to a shared national agenda in Parliament for these reforms;
- Other legislative, structural, political and economic reforms as needed.

We have only outstanding issue under this Agenda Item, the governance structure, which is being actively discussed. Several options have emerged and the parties are going to consult their principals and leadership on these options and will revert to the chair shortly.

We also agree that the issue in Agenda Item Four are fundamental to the root causes of the crisis, and are closely linked with Agenda Item Three. The implementation of the following reforms should commence urgently in concert with reforms of Agenda Item Three. However, these processes may continue beyond the timeline of the next election.

- Consolidating national cohesion and unity;
- Land reform;
- Tackling poverty and inequity, as well as combating regional development imbalances, particularly promoting equal access to opportunity;
- Tackling unemployment, particularly among the youth;
- Reform public Service;
- Strengthening of anti-corruption laws/public accountability mechanisms;
- Addressing issues of accountability and transparency.

We recognize that this settlement is not about sharing of political positions but about addressing the fundamental root causes of recurrent conflict, and we reaffirm our commitment to address the issues within Agenda Item Four expeditiously and comprehensively.

Milestones and benchmarks for the implementation of the reform agenda will have to be defined.

Source: (KNDR Secretariat, Nairobi, 2008)

When implemented in liberal peacebuilding paradigms, advocates of transitional justice argue that its mechanism facilitates a wider access to justice and promotes greater democratisation (Arenhovel, 2008; Elster, 2004; Teitel, 2000). Yet there is a need to investigate how transitional justice becomes part of the existing attempts to implement democratisation, rather than signifying democratic transition in Kenya (Brown, 2013; Hansen, 2012b). There is an overwhelming tendency in the literature of transitional justice to treat post-conflict justice experiments in post-authoritarian

environment in Latin America and Eastern European countries as similar to the current situation concerning the consolidation of democracy and post-conflict peacebuilding in African countries like Kenya. While integrating transitional justice with broader liberal peacebuilding concerns leads to broader institutional reforms projects (as are currently being witnessed in the country), it will later be argued that neither the ICC nor the TJRC's proceedings are directly connected to the victims' ordinary or everyday understanding of justice and reconciliation in Kenya (fieldwork note no. 1, Rift Valley, February 29, 2009).

It is nearly impossible to frame uniform national narratives of justice and reconciliation (interview with IDP no. 3, Rift Valley, February 15, 2009). For example, the TJRC hearing sessions in one district differs from those of another district less than a kilometre away. Arguably, the process is evolving and may eventually contribute to a generic understanding of justice and reconciliation in Kenyan society but to date this is uncertain. In exploring the nature of the situation that arose from the KNDR agreement, the term 'transitional justice mechanism(s) or institution(s)' (as explored in Chapter 2) and the term 'justice- and reconciliation-seeking policy' in Kenya (as illustrated in Chapter 3) will be used interchangeably throughout this thesis. This is owing to the lack of a general agreement in transitional justice literature (Olsen et al., 2010a: p.9), and contemporary Kenyan politics (Lynch and Zgonec-Rozej, 2013: p.6) as to whether a specific policy undertaken after conflict can be legitimately identified as a case study for transitional justice.

The pragmatic approach taken in this thesis has been selected on the basis of the fact that the process that occurred in Kenya after the 2008 crisis intersects with concerns

specified in the wider literature in transitional justice. Additionally, the approach focuses on the increasing interaction between two sides of the same coin of international intervention: Transitional justice and post-conflict peacebuilding as part of the broader liberal cosmopolitan agenda that has endured since the end of the Cold War (see Lambourne, 2004; 2009; Lambourne and Herro, 2008; Paris, 2004; Richmond, 2012). The interaction between that two fields is of crucial concern here, and an examination of how the process of terminating post-election violence in Kenya is “becoming” increasingly relevant to a debate that is commonly associated with transitional justice: how to implement the transitional justice mechanism through peacebuilding practices (see Brown, 2013).

‘Traditionally, peacebuilding and transitional justice literatures and practice either have not engaged one another or have been in tension, or even opposition’ (Garcia-Godos and Sriram, 2013: p.1). ‘Much ink has been spilled on the purposes and content of both transitional justice and peacebuilding, and both concepts continue to evolve’ (p.12) In this context, this thesis draws from the author’s recent experiences in Kenya and is an attempt to critically advance an understanding of how two different fields collude or entwine. The following questions will be posed; in what way have the measures put forward by the KNDR agreement responded to the legacy of electoral violence and a long decade of historical violence in Kenya, and how did they later interact with the mechanisms commonly associated with transitional justice? How have the major actors responded to justice- and reconciliation-seeking policy, and in what ways has it been employed as a political and judicial tool? What political factors and considerations underlie the epistemic assumptions and contemporary perceptions about broadening the discreet legal process of transitional

justice into peacebuilding practices, and how has this enriched the debate on justice- and reconciliation-seeking policy in Kenya? Finally: what is the realistic potential of transitional justice mechanisms to reduce future political violence, and what are the limitations?

C – The Justification of the Case Study

Having outlined the key research inquiries, it now remains to justify the aforementioned country and subject: Kenya and, justice- and reconciliation-seeking policies. Kenya is interesting because ‘renditions of the causes, debates about the outcome and prospects of the country’s worrying situation are both intense and polarising, reflecting diverse political shades and ideological predilections of analysts’ (Kagwanja and Southall, 2010: p.1). Unaspiringly, the post-election crisis has ‘inspired a burst of academic productivity’ (Abrahamsen and Cheeseman, 2013: p.1) in numerous publications during the few years since the crises came to be regarded as the worst event to befall the country since independence. Moreover, when both principals–Kibaki and Odinga–agreed to end the electoral violence, they set out an agenda negotiated in the power-sharing agreement, which was to be included in the justice- and reconciliation-seeking policy (Chapter 3). Yet, there has been more disagreement than consensus among key partners of the GNU on the need to implement the justice- and reconciliation-seeking policy, owing mostly to the institutional constraints imposed on the state following the flawed and unstable power-sharing peace agreement (Cheeseman and Tendi, 2010; Cheeseman, 2011; Hansen, 2013b; Musila, 2009a).

Among the core elements constituting this agreement was a general call for the criminal prosecution of perpetrators of electoral violence (accountability); and the formation of the TJRC. The implementation of a power-sharing settlement in Kenya not only ensured the institutionalisation of both the TJRC and ICC, but also the sequences that eventually led to further expeditious reforms by establishing a new constitution and implementing electoral management, democratic consolidation and peacebuilding practices. As such, compared to the many transitional justice institutions worldwide, Kenya's hybrid processes and multiple mechanisms of justice- and reconciliation-seeking policy are ambitious. They are also controversial in their attempts to expand transitional justice into other fields of political reforms: the repairing of social contracts, peacebuilding, governance, greater democratisation and historical injustice.

Kofi Annan has argued that the implementation of the agreement is 'a unique opportunity for Kenya' and offers the *wananchi* (citizen) 'a constitutional moment' with which to free Kenya from the post-independence scramble of civil war, uneven development, political impunity, corruption and systematic violations of human rights that are synonymous with the African politics (Annan, 2008: p.7). However, as will be explored later, many skeptics (particularly advocates of human rights) have criticized the 'Kenyan way' of transitional justice, decrying it as a 'cosmetic sham' and a politicisation of justice that complicates the legal process for addressing the mass atrocities (Amadi, 2009: p.151).

The above gives a general outline of why there is a widespread concern that similar transitional justice mechanisms may plausibly be adopted by Zimbabwe, Nigeria, the

Ivory Coast, Mali and Libya in their attempts to deal with their crises. Following the election disputes in Kenya, there was a vague but overwhelming demand for justice and long overdue political reforms, which would be implemented at the expense of transitional justice mechanisms. Due to an increasing emphasis on the rule of law and peacebuilding practices within the majority of the aforementioned countries, power-sharing peace agreements and broad democratic reforms through international-regional interventions have come to be associated with a vague demand for criminal accountability at the expense of transitional justice (Jarstad, 2009: p.49; Mindzie, 2010: p.115).

One of the oddities of this post-conflict reconstruction model is the multiple, hybrid mechanisms of transitional justice; and the intersection of its mechanism with an international peacebuilding agenda (as in the UN's agenda in 2004). This has expanded the general understanding of justice, which now seems ideal in theory but elusive in practice (Binningsbø et al., 2012: p.738; McAdams, 2011: p.8; Sriram, 2010: p.282). In the words of one of the TJRC's officers, 'never before has a study of how to implement a peace agenda in the wake of disputed elections in Africa or anywhere else been associated with a transitional justice' (interview with TJRC Officer no. 1, Nairobi, February 5, 2012).

Yet, the anomalies that have arisen from Kenya's situation have demystified transitional justice as a subject of law, and therefore separable from politics. This arguably is an indication of a recent development of transitional justice as having moved or "mutated" from being a "thick" legal analysis into a practice that is

politically synonymous with “coming to terms with past wrongdoings”.³ Interestingly, it was the maxim of *Nunca Mas* (Never Again) used in relation to Argentina’s experience of coming to terms with its past atrocities that enriched the debate on transitional justice (see Crenzel, 2008; 2011).

From specifically international criminal law (ICL) literatures and retrospective studies of the Nuremberg and Tokyo tribunals, transitional justice has evolved into a multidisciplinary field that has attracted various non-legal commentators, including political scientists, economists, psychologists and socio-anthropologists (Arthur, 2009; Elster, 2004; Kritz, 1995; Minow, 1998). Chapter 2 describes the genealogical development of transitional justice, how the current transitional justice literature is relatively distinct and is becoming multidisciplinary and how it later came to interact with peacebuilding scholarship. Below, it will be shown how transitional justice’s deepening affinity with liberal peacebuilding projects makes a strong case for navigating law and politics in post-conflict studies.

D – Navigating Law and Politics: Pursuing Transitional Justice through Peacebuilding Practices

In the introduction to the four edited volumes of *Law and Politics*, Keith Whittington has argued that while modern political studies focus on the ‘scientific’ assessment of the state and how power is revolved, law focuses on the state’s legal façade; and how the state enforces its legislative regulations (2013: p.I). Hence, the intersection between politics and law continues to be an ‘important element’ of political studies, in

³ Since its interaction with other fields like peacebuilding, democratisation and development, transitional justice have moving increasingly towards an examination of how various societies come to terms with their past wrongdoings. Consequently, transitional justice has found its way into diplomatic mission to resolve crises that cannot be analytically categories as belonging to a clear regime change. See Fletcher et al., 2009; Merwe et al., 2009; Short, 2013; Therien, 2012; Winter, 2013.

which the legal procedures serve as both an instrument (realist) of the state, as well as a source of constraint (liberalist) with which to police the state (Widner, 2001: pp.66-7). If a study of law tends to focus on the ‘administrative’ dimension of enacting power, political studies concerned with the ‘enforcement’ of justice by those in power provides us with a better understanding of state-society relations (Dowrkin, 1982: p.199). For example, a study of the impact of human rights and constitutional laws upon the consolidation of democracy in developing countries would fulfill this purpose (Falk et al., 2006: p.711-12).

Such studies of constitutional law, judiciary and legislative relations were ‘acknowledged’ to be essential to advancing researchers’ understanding of the state and its legal obligations (Laryezower et al., 2002: p.713). ‘It is true that politics are not law, but an adequate notion of a body of law cannot be gained without understanding the society in and for which it exists, ...’ (Westlake, 1894: p.92). In today’s scholarship, there is widespread concern about the uneasy relationship between politics and law at the global level, which may only serve to confirm the longstanding antinomy between the social contract debates of Thomas Hobbes’s *Leviathan* and John Locke’s *Two Treatise of Governments* (Lee, 2010: p.3).

In examining the nature of authority in both classical works, Anthony Lang’s observation on the execution of punishment and justice in the post-Cold War period has revealed the extent of the tension between politics and law (see Lang, 2008: pp.28-38). The recognition of this tension is attributable to both writers and their experiences of living through the English Civil War. Living as a political exile with Royalist factions during the war had a profound intellectual impact upon Hobbes’

famous thesis on the importance of having a robust *leviathan* (sovereign) as an authority for maintaining peace⁴, but not for dispensing justice (p.30). Hobbes did not recognise the juridical authority that was wielded by foreign powers, or by those who did not belong to the political community about which he was writing (p.30). Such a “realist” understanding of sovereignty may help to explain the state’s reluctance to be subjected to universal jurisdiction (by means of the ICC and R2P), although mass atrocities have been legally recognised as constituting crimes against humanity, which removed the state’s exclusive entitlement to sovereignty and overrode its policy of refusing to be subjected to international intervention (Lee, 2010: p.20).

In contrast to Hobbes, Locke (who also lived as an exile during the later stages of the same war, but against the monarch) based his understanding of punishment for violations perpetrated in a state of nature or emergency on assumptions that the subjects or ‘individuals have certain natural rights’ to defend themselves (Lang, 2008: p.33). This state of nature resembles the current anarchical features of the international system, which functions without a single governmental authority. It is also significant that the continuing mass atrocities in the state of anarchy required some form of criminal accountability to be imposed by supranational entity like the ICC (Francis and Francis, 2010: p.62). Arguably, Locke’s recognition of various individual rights, including that of the foreigner to exercise justice if they are not subjects of the sovereign (who committed crimes against humanity) served as a starting point for many international criminal debates on the justification for using international law to impose sanctions on the state in punishment for its wrongdoings (Drumbl, 2007: p.15).

⁴ What Hobbes understands as the maintenance of peace and order by the strong legitimate sovereign is recognized by transitional justice literature as negative peace, because it is synonymous with the elite post-conflict demands for amnesty and their pursuit of impunity, see Sriram., 2006a.

As such an interdependent yet conflicting relationship between politics and law has ‘reappeared’ in studies of how society comes to terms with its past wrongdoings through a war crime tribunal; or studies the state’s reluctance to surrender its sovereignty to ICL sanctions (Bassiouni, 2000: p.215; Bevernage, 2013: p.92; Morton, 1999: p.7). The international dynamics of the likely situation like Kenya are understood by some commentators to indicate the interdisciplinary attempts of political scientists to incorporate the idea of ‘legalism’ into their international political research agenda (Goldstein et al., 2000: p.385). For instance, the key source of confusion in the field of international thought and practice is the reason for why the state actors invested so much time and energy in pursuing supranational legal commitments—such as the ratification of the Rome Statute of the ICC—when this pursuit compromises their opportunity to navigate interests of power. Accordingly, recognising the unsmooth or roughshod nature of the interaction between law and politics is the key to determining the degree to which international rules are obligatory. This recognition can also help us to gain a clearer understanding of the precision of such rules, and the true effect of delegating some juridical functions of interpreting or monitoring public international law to state and non-state actors (p.386).

As such, when anomalies began to appear, scholars emphasised the importance of distinguishing ‘the rule of law’—as it is procedurally understood the administration of the treaties and customaries of international law—from the ‘order of the system’. This order of the system is predominantly understood by political studies commentators as the state system that underpins the international political system. The analysis of this

state system ranks alongside that of the predominant features of neo-patrimonialism in priority in the agendas of comparative political research projects on democracy and human rights in developing countries.

In short, the agendas of transitional justice research projects are largely underpinned by an increasing move towards a legalist approach to political science. Formerly, the subject of transitional justice was considered as an auxiliary subject of the broader disciplines of human rights, the rules of law and democratic transition in political science, as well as the study of tribunal and international jurisdiction in legal studies. In this respect, much post-conflict peacebuilding literature is normative and concerns itself with the ‘political question’ of rebuilding the state. Meanwhile, the ICL and transitional justice literatures are mostly concerned with not only the ‘legal question’ of how to strengthen the rules of law, security and order, but also the political implications of adopting legal and non-legal mechanisms in post-conflict reconstruction policies (Barakat and Waldman, 2013; Hannum, 2006; Sriram et al., 2013; Teitel, 2005).

With the development of the ad-hoc international tribunal in the Balkans and Rwanda, the UN promoted a theme of peacebuilding through law. The 2004 report on *the Rules of Law and Transitional Justice in Conflict and Post-conflict Societies* has arguably “neologised” the international liberal peacebuilding agenda in terms of not only addressing the political complexities of the peace process, but also the legal complexity of war-torn societies. Hence, there is a valid justification for expecting a polemical debate between law and politics to resurface in literatures that recognise the adoption of the international tribunal and other non-judicial mechanisms through

peacebuilding enterprises (Picciotto, 2010; Piccolino and Karlsrud, 2011; Sriram., 2006b; 2007; Sriram and Pillay, 2009; Sriram et al., 2009).

The mushrooming growth of such literatures has reinforced the general presumption of the conflicting relationship between international relations (IR) and international law (IL), especially when IL has shied away from admitting the “anarchical” features of IR (see Cox and O'Neil, 2008; Burley, 1993; Koskenniemi, 1990; Sriram., 2006a). This has also confirmed the assertions of those who subscribe to Hedley Bull's understanding of politics, in which ‘men within each state are subject to common government, sovereign states in their mutual relations are not’ (2000: p.77). However, framing such a polemical debate between IL and IR has not only proved to be counterproductive, but ignores the development of the study of law in comparative societies that has been progressing since the 1990s (Slaughter et al., 1998: p.393). It has also ignored the progress towards more dialogical and interpretative approaches in social science despite the firm features of the positivism in legal studies (Akande, 2004; Chhang, 2007; Drumbl, 2007; Roach, 2005).

Some of the approaches, especially those of Critical Legal Studies (CLS) and pluralist readings of law in the late 1980s and early 1990s (which form part of the third major debate in the field of social sciences) have attracted the legal analysis of the American constitution and post-colonial legal orders in developing countries, including in Africa (see Anand, 1962; Balkin, 1994; Ward, 2004). These analyses adopt the various and plural strands from Positivist, Marxist, Constructivist and Poststructuralist thought in order to interpret the functions of state institutions, regional arrangements, human rights and international criminal tribunals (Acemoglu et al., 2000; Anghie, 2006;

Balkin, 1987; 1992; Gow and Zverzhanovski, 2004; Orentlicher, 1999; Smith, 2002; Sands, 2003). In the case of CLS, the concern is not so much about the procedural dimension of legal functions but the substantive significance of legal impositions on the political community (Bryde, 1977; Nevins, 2003; Ruskola, 2003; Triamble, 1990; Ward, 2004).

The expanding literatures of comparative politics, constitutional law, human rights, international sanction, truth commissions and post-conflict tribunals have enriched understanding on the interaction between law and politics (Snyder and Vinjamuri, 2004; Vinjamuri and Snyder, 2004), and allowed the debate concerning this interaction to move beyond the classical contest between positivist and natural law, which is essentially a legal-normative debate about 'law as it should be and law as it is supposed to be' (see Fuller, 1957; Hart, 1958; Holmes, 1897; Schwarz, 1985).

One of the earliest attempts to navigate law and politics away from such a normative debate appeared in Ruti Teitel's *Transitional Justice* (2000). Adopting a constructivist framework, she re-synthesised the study of transitional justice by examining the use of justice mechanisms in a period of political transition (anarchy), but excluded an infinitesimal segment of the political transition (p.25). Yet her refusal (p.26) to consider some of the CLS' assumptions about the political component of law in post-conflict reconstruction policy has not escaped criticism. The increasing call for a valid assessment of transitional justice in the former Republic of Yugoslavia, Rwanda, Sierra Leone, South Africa, Cambodia, Timor Leste; as well as the ICC's proceedings in Libya, Kenya, Northern Uganda and the Ivory Coast has confirmed the inconvenient truth that law and politics remained inseparable, particularly in a post-

conflict environment (see Gready, 2005; Hannum, 2006; Vinjamuri, 2010). In these studies, the role of politics in the execution of justice in post-conflict environments has been understood as a call for legal positivism to recognise the following:

1. Transitional justice does not arise from an empty vacuum, but is a part of the political bargaining chip between the local elites and international policymakers in implementing justice mechanisms (see Çubukçu, 2013; Lokongo, 2012);
2. The political and legal complexities of criminalising atrocities committed by the state actors, or of identifying the subjects or objects of the state crime (see Clarke, 2009; Gow and Zverzhanovski, 2004);
3. The disconnection of those identified as victims of heinous crimes resulting from the imposition of justice mechanisms from the everyday reality of the post-conflict societies. In this context, justice functions as a global enterprise or template of conflict resolution (see Allen, 2008; Clark, 2012c);
4. The cultural relativist claim that the execution of justice is deeply affected in the way that justice is conceived by the society, and by the society's call for cultural considerations (see Kelsall, 2009; Mamdani, 2009);
5. Power struggles/relations and the ideological apparatus of justice mechanisms within an unclear transition being affected in the midst of ongoing conflict, and the issue of who speaks for the victim and who speaks for the accused (see Moon, 2008; Thomson and Nagy, 2011).

In this thesis, the author recognises the fact that - like many political or legal disciplines-CLS scholarship has not produced a single, monolithic body of corpus, but several divergent strands, each of which can be regarded as concerning itself with

one of five major themes (see Bauman, 1996). The primary CLS traditions from which this thesis draws fall can be said to align themselves with the second strand, ‘law and politics’, as well as the third strand, which represents the idea that ‘law tends to serve the interests of the wealthy and powerful’ (Kelman, 1987: p.34).

Pursuing the second strand of CLS allows this thesis to focus its critical reflections on transitional justice institutions in Kenya in a way that facilitates the substantiation of the assertion that legal decisions impact on political decisions. While legal and political decisions may differ in terms of notions of expediency, both are formulated around the construction and maintenance of a form of social space. While this thesis criticises the positivist idea that law and politics can remain wholly separate from one another, it also rejects the extreme reductionist view that ‘all law is politics’ (p.35). Largely, this thesis concurs with some of the more pragmatic CLS assumptions that law and politics are intertwined. Following this second strand of CLS allows this thesis to view transitional justice institutions as products of legal arrangements that are intersected with post-conflict peacebuilding bargains, which themselves are subject to political discussions. As such, transitional justice is not simply discreet legal process; crucially, its successful execution revolves around questions of power.

The third strand of CLS is largely influenced by Marxist writings concerning jurisprudence (Unger, 1983: p.12). This strand also relates to legal arrangements or consensus implemented by the powerful ruling class against minority groups, including subaltern agencies like women, small ethnic groups, the gay community, refugees or IDPs. Interconnected with this strand is the legal realist argument that what the law prescribes and what it does are two different things. While a surface

analysis within this third strands may view law simply as an instrument of social injustice wielded by the ruling elite, the aim here is to reveal the ‘invisibility’ of the subaltern agents who have been subjected to political manipulations. The achievement of this aim requires post-conflict society to undertake further legal or political reforms, and to accept that removing structural barriers to social inequality is of greater importance than simply embarking on a legal crusade in the form of war crime tribunals, or than the formal, administrative necessity of publishing the truth commission’s final report (see Thomson, 2013b). The pursuit of this third strand of CLS allows this thesis to characterise transitional justice institutions as ‘technologies of power’, in that they form part of the ideological apparatus of the global, post-conflict peacebuilding template that has so far only produced a ‘virtual peace’ (Taylor, 2007: p.557) and ‘fiction of justice’ (Clarke, 2009: p.62).

E – The State, and the Neo-patrimonial Mode of Politics: Power and Ideology

In the task of examining the nature of transitional justice in Kenya, all the aforementioned key debates are either implicitly or explicitly connected to the search for sustainable justice- and reconciliation-seeking policies. This thesis, however, is primarily concerned with the issues of power and ideology. Chapter 2 advances a framework for examining the social process of implementing transitional justice in Kenya through the lens of Michel Foucault’s conception of power (1977; 1980b; 1980a; 1984; 1997b; 1997a; 2002a; 2002b) and Louis Althusser’s notion of ideology (1971; 1976; 1977; 2001). As for the definition of power, this thesis aligns itself to some extent with Joseph Nye’s assumption that it is impossible to subscribe to a single monolithic of the definition, since the concept itself is highly contested (2011: p.9). Consequently, it is best to use a definition of power that is capable of benefiting

this research inquiry. Indeed, in his article, ‘Why should We Care about the Definition of Power?’, Keith Dowding concluded that, while adopting a pluralist approach to defining power may seem beneficial, definitions of power are best applied to the specific contexts in which it is wielded; a particular definition should only be ‘judged’ as productive when it can be successfully applied to the case study (2012: p.133). It is impossible to arrive at a single definition of power when every researcher is considering different aspects of what constitutes it.

As will later be discussed in Chapter 2, Foucault’s conception of power is ‘structural’. In this respect, it differs from mainstream⁵ IR theories and other reductionist definitions of power, however, it is arguably the most suitable method for contextualising power relations and locating these relational positions in the politics of transitional justice in Kenya⁶ (see Barnett and Duvall, 2005; Macmillan, 2010). Furthermore, as Carl Death has argued, the study of the application of Foucault’s method to IR can be divided into two main bodies of literature. One concerns the Foucauldian critiques of neo-liberal practices as extensions of the development of liberalism in European history. The other addresses the use of Foucault in a general analysis of power in any form of government (2012: p.8). Arguably, the first strand allows for more of an acute analysis of the current liberal cosmopolitan projects in

⁵ ‘Mainstream’ here relates to the major theories that are commonly used to make observations about international phenomena. The major theories that can be considered as mainstream IR theories in the analysis of power are those of realism, liberalism and (arguably) constructivism, see Buzan and Acharya, 2010.

⁶ In localising the concept of power within the broader literature concerning this concept in IR, scholars have built up a matrix of specialised research on power. This research has shown that investigations of intra-politics are more suitably conducted by adopting the Foucauldian approach to power (Barnett and Duvall, 2005). Accordingly, the socio-legal analysis of transitional justice in the domestic politics of Kenya is conducted in this thesis through the lens of Foucault’s ideas on power. Indeed, such epistemological traditions are widely recognised by Foucauldian scholarship itself, in its attempts to explore the question of power and the location of agency in the structure of the social process (Macmillan, 2010).

transitional justice and peacebuilding as extensions of the liberal projects of the 20th century, and the second strand can be used to analyse Kenya's form of government.

While the exploration of Foucault's works thus helps us to contextualise transitional justice as representative of power relations, it is important not to neglect the element of 'ideology' which is discussed in Chapter 2 (Lecourt, 1975: p. 207). As such, the political reading of transitional justice is informed by these two separate elements of power and ideology. While the term 'ideology' is vaguely contested in political theories, it has unquestionably contributed to a substantive configuration of the political issues that are currently most pertinent in society (Elster and Landemore, 2008: p. 284). Michael Freeden asserts that the 'ubiquity of ideology' is crucial to contextualising 'the human interaction that involves power transactions', as many of the most incisive works of political theory are embedded in a particular ideological contingency (2006: p.19).

Hence, this thesis draws from what Freeden identifies—in his sketches of the four major developments in the way ideology had been conceived in modern history—as a fourth critical development, in which the understanding of ideology is based on Althusser's reading of Karl Marx (p.15). Althusser recognised the difficulty for an agent (or actor) to arrive at its own social reality (since there is no objective reality), and therefore suggested that what the agent visualises as reality is informed by set of ideologies (Boer, 2007: p.484). Hence, Chapter 2's hypothetical consideration of how to dispense justice without punishing the members of Kenya's ruling class is unlikely to accord with the vision of retributive and restorative justice shared by the Internally Displaced Persons (IDPs) who have been eyewitnesses to atrocities.

Claire Moon's *Narrating Political Reconciliation in South Africa* confirms the transitional justice suitability of Foucault's methods by contextualising the experiment in South Africa as power; however, she also admitted that Foucault's identification of power through 'discourse' and 'genealogy' is essentially an abstract exercise that must be connected to concrete, social realities to which transitional justice is applied (2008: p.55). As such, this thesis agreed with her assertion that Foucault's conception of power is akin to Althusser's understanding of ideology in his *Ideological State Apparatus* (ISA) (p.56). As is discussed in Chapter 2, Althusser developed his innovative interpretation of ideology by identifying its material existence or mechanism (Wolff, 1998: p.90).

In this thesis, transitional justice mechanisms are presented as contested forms of ideology, defined by the two opposing ideas of accountability and impunity. They are represented by two major, specific transitional justice mechanisms currently operating in Kenya; the ICC and the TJRC. Although Foucault and Althusser emerged from two different intellectual traditions, it is arguable that Foucault's description of power and of subjugation to the neoliberal domination can be connected to Althusser's criticisms of capitalism's exploitation of the people's hopes by projecting a false, liberal ideology of freedom in the 20th century (see Goldstein, 2004; Resch, 1989). This thesis acknowledges that by applying the ideas of Foucault and Althusser in this way, its conclusions will neither satisfy those who believe their ideas should be used in critical approaches, nor those who employ their ideas as a rejection of positivist approaches.

Without Foucault and Althusser's systematic work on locating the practices of power and ideology in modern society, I would not have been able to perceive that transitional justice can be viewed as power as well as ideology. Aligning itself with a similar study undertaken by Moon and Thomson, the innovative reading of transitional justice as politics in this thesis is explicitly concerned with an understanding of justice and reconciliation from the victim's perspective; with how Foucault's power and Althusser's of ideology of justice were "played out" by specific transitional justice mechanisms in the wake of post-election violence; and with how this affected the everyday lives of Kenyan residents of the IDP camps (Interview with IDP no. 9, Rift Valley, February 25, 2009).

The ICC's and TJRC's proceedings are the "disciplinary technology" of power, and the ideological apparatus with which the GNU officials (especially the ICC's suspects) and the IDPs are trapped in relational positions. As such, the research undertaken here differs from the statist and system analysis approaches in 'conventional political science' (Scott, 1998: p.27). In conventional political science, the state is an 'a priori concept' or main focus of analysis (Abrams, 1988; Jessop, 1990; Mitchell, 1991). The perspective adopted in this thesis is similar to that of Scott (1986), Englund (2006) and Thomson (2013b) in their analyses, of the nature of the constitutive processes of legal instruments or other state policies in tapping into the everyday lives of citizens, and the impact of such instruments upon the ordinary populace. This approach inevitably revealed the different understandings of justice and reconciliation among the marginalised citizens in their opinions of those who occupied the apex of the state.

Given its focus on how the ideas of the state are made and inescapable part of the everyday life of Kenyans, this thesis' understanding of transitional justice through power and ideology may help the readers of African politics to broaden their understanding of the logic of neo-patrimonialism, and to determine its precise purpose in the increasingly popular application of transitional justice mechanisms as a means of resolving Africa's election disputes. What has been imperfectly described as neo-patrimonialism in Kenyan politics could be better understood by applying this concept to a more acute analysis of the political logic behind the justice- and reconciliation-seeking policy in Kenya. Such an analysis could also help to gain a clearer understanding of the politics of accountability and the impunity that has further complicated the relations between African leaders and their foreign partners, and the potential prospect of reconciliation with victims who have directly or indirectly suffered at the hands of the criminally indicted local elite (interview with The American University's Lecturer no. 4, Cairo, 23 July, 2011). There are many works that attempt to explain the logic of neo-patrimonialism in African politics, democratisation and development, (Bratton and Walle, 1997; Chabal and Daloz, 1999; Erdmann, 2002), as well as Kenya's political economy (Berman and Lonsdale, 1990b; Currie and Ray, 1984; Haugerud, 1997; Widner, 1992). However, only a few of these works have succeeded in providing an analytically explanation of this logic (see Berman et al., 2009).

This thesis analyses the Kenyan leaders' resistance to being held accountable for the post-election violence, and the strategic calculations made by the victims in rejecting their leaders and international agents. It is for this reason that I have suggested that the interweaving relationship between politics and law, that is so crucial to understanding

the position of transitional justice in the aftermath of the post-election violence, may best to be captured by a framework that uses concepts of power and ideology to identify the logic of neo-patrimonialism in the process of implementing justice- and reconciliation-seeking policies in Kenya.

While Chapter 2 traces the neo-patrimonial logic through the longstanding culture of impunity in Kenyan politics, it is beyond the scope of this thesis to conduct an in-depth investigation of the role of neo-patrimonial logic in the broader literature of African politics. Therefore, I considered this role in relation to Gero Erdman and Ulf Engel's concerns about the 'non-analytical' usage of such Weberian inventions (2007: p.96). Both argue that the concept does not make sense when one attempts to distinguish patrimonial and neo-patrimonial power:

[d]oes this mean that all political power is personal power? Are all public affairs privatised in Africa? The problem is that it overemphasises personal power and privatisation. If all political power is personal power and all public affairs are privatised, then we are back to patrimonialism, albeit in a 'modern environment' (whatever that means) merely to justify the prefix of 'neo'. (: p.102)

Hence, to avoid the mistake of a 'catch-all concept' of neo-patrimonialism, this thesis adopted Erdman and Ulf's conception that the term is a 'creative mix' of two prototypes of 'post-Weberian innovation'; (a) legal, rational bureaucracy; and (b), traditional patrimonial domination (p.103). This means that not all affairs that understood as official (in state-society relations) are necessarily privatised and, that the *modus operandi* for political institutions is to be 'informal' in involving themselves in the everyday lives of Kenyans. Official functions, such as the distribution of jobs, tax revenue, constitutional drafts, special tribunal bills through legal gazettes (parliament) and the process of rectifying the power-sharing peace agreement between the two main conflicting parties (as mediated by the third party

and external actors) are conducted in the diplomatic and official domains. Simultaneously, however, this thesis does not deny that the ruling class allocates special jobs based on their ethnicity and within the patronage networks (power sharing cabinet portfolios); that the illegal meetings are held between political cartels to lobby for parliamentary votes against the ICC is based on the strategic calculation of those ruling elite. Analytically, the primary concern here is to determine to what extent the establishment of what is known as ‘informal personal rule’ invades the legal-rational bureaucracy, and impacts significantly upon the dynamics of justice- and reconciliation-seeking policy in Kenya.

I believe that the proposed framework of power and ideology (illustrated in Chapter 2) for understanding the political process of ending the post-election violence and “cultivating” transitional justice in Kenya is capable of explaining the intersection of politics and law, as well as the specific features of neo-patrimonialism that appeared after the post-election violence in Kenya. In this respect, informal and patronage-based modes of access constituted the predominant mode of governance, but such modes relied on the existing formal, legal, rational bureaucracy of the state (Berman et al., 2009: p.465). Without doing so within the official domain of the state, it is nearly impossible for the ruling class to continue with its neo-patrimonial politics. If the neo-patrimonial logic of governance equates to the maxim ‘the more things change, the more they remain the same’, claiming political legitimacy after the crisis required the ruling class to rely on the juridical statehood conferred by the international system (see Cheeseman, 2009; Mueller, 2011).

As a result, the transnational pressure to establish accountability (from the ICC and

the TJRC) have strained the political elite's claim to legitimacy, resulting in the manipulation of transitional justice mechanisms as a means of 'conveying the impression that the formal rules of democracy are followed, while the substance is violated' (Piccolino, 2014: p.63). The international determination to export a 'functional state' and a western notion of justice has transitional justice mechanisms more susceptible to manipulation by the elites; this leads to the decay of peace, rather than peacebuilding (p.64).

Understanding transitional justice mechanisms as forms of ideological apparatus, and locating this apparatus within the constellation of power relations, reveals the constitutive relationship between law and politics. Rather than standing in contradiction to what were perceived as 'unlawful', 'unconstitutional' and 'informal' politics, the ruling class' obsession with the official and legal discourses of transitional justice mechanisms perpetuates the practice of impunity, and renews the old rhetoric of 'nothing changes, except business as usual' (interview with a local businessman; Mombasa, February 20, 2012). Such an obsession with law (in debating the roles of the ICC and TJRC) constitutes a central part of the political culture in modern Kenya, where leaders hide their neo-patrimonial practices under the peculiar cloak of legalism and juridical statehood.

By extolling the virtues of peace and reconciliation, they are able to impede the processes of prosecution and criminal justice. This helps to account for the politics of accountability that has been practiced since the return of multiparty elections in the 1990s (see Chapter 2), as well as the dramatic policy of 'shuttle diplomacy' initiated by the Kenyan government, which romanticised Africa's uniqueness in challenging

the jurisdiction of the ICC (see Chapter 4) following the implementation of the KNDR agreement (see Chapter 3). Hence, rather than rejecting the predominant logic of neo-patrimonialism in the literature of African politics, this thesis embraces such logic by engaging in a reading of power and ideology in order to conceptualise the alteration of social dynamics and the key political processes that occurred between February 2008 and March 2013. However, it is important to specify some other reasons for why Foucault and Althusser's respective conceptions of power and ideology have been chosen for this thesis.

F – The Rationale for Using Foucault's Power and Althusser's Ideology

The works by Harri Englund (2006), Claire Moon (2008), James Scott (1998) and Susan Thomson (2013) have succinctly demonstrated that the current understanding of the neo-patrimonial logic of African politics can be further explained by using both Foucault and Althusser's studies of how the docile body of power and the political economy of violence were both embedded in the ruling class' struggles to develop political authority. Although the writings of these Western thinkers are not essential to understanding how the eruption of "madness" or anarchy was caused by those who wielded power and wealth in Nairobi, such works have enabled this thesis to illustrate the logic behind the violence, oppression and political control involved in negating people's rights and justice (interview with University of Nairobi's Lecturer no. 5, Nairobi, February 7, 2012).

One does not establish that a crime has been committed merely by examining the crime scene (as a result of the violence). In this case, however, it is possible to match the pattern of crime to match the crime scene by conducting a scientific investigation

upon the social structure within which the *wananchi* (citizen) were being dialectically subjugated (Ahluwalia, 2007: p.47). ‘Scientific’, is used to denote the production of knowledge here, or the way in which we base our understanding of violence and reconciliation in African societies on certain assumptions (Smthy, 2005: p.20). Even if the full extent of what actually occurred during the crisis may never be understood, does this necessitate that international agents should stop assisting African countries? ‘Surely those who glorified our uniqueness are the true masters of evil!’ (interview with retired judge no. 2, Nairobi, March 15, 2012).

Such an understanding provides a justification for using the ideas of Foucault and Althusser and other theorists, whose ideas are otherwise contested by post-colonialist positions by virtue of their not having originated from Africa (Grovoqui, 2010: p247). Applying Western ideas to Kenya, as some scholars of post-colonialism argue, is problematic. But the IDPs’ experience of violence and desire for reconciliation and justice is not a novel phenomenon. Indeed, it is best captured through the existing scholarly works that are indebted to the aforementioned thinkers. Chapter 2 elucidates how the contemporary literatures of transitional justice in Sierra Leone, South Africa, Rwanda and Kenya arrived at certain assumptions about the politics of justice, and uses the concepts of power and ideology advanced by Foucault and Althusser to determine the nature of justice- and reconciliation-seeking policy in the aforementioned countries. For time being, suffice to say that the use of both scholarly works does not imply that their works have intentionally described the nature of violence and justice in war-torn societies. It is probable that their experiences of having lived through major crises in Europe, as well as their interactions with historical events in Northern Africa (Foucault having lived in Tunisia and Althusser being born in Algeria) inspired their understanding of the phenomenology of power

and ideology that forms the basis of our understanding about violence and justice in Africa (Stanford Encyclopedia of Philosophy, 2003; 2009).

Furthermore, Foucault suggests that the operation of the justice system is connected to the function of war, and serves the purpose of strengthening the position of the sovereign (1980b, p.75). This provides an avenue for us to conduct an in-depth investigation on the relationship between transitional justice (as a system of justice in the aftermath of the violence) (Reyna and Schiller, 1998: p.339); the way in which Kenya's ruling class wields its power as a tool of subjugation (Ahluwalia, 2007: p.46); and the way which it manages its relations with IDPs, as well as with the international actors that are involved in the system (interview with retired judge no. 1, Mombasa, February 21, 2012).

The impact of Foucault's experiences on his writings about Africa has been discussed by one of the most renowned Kenyan writers, Paul Ahluwalia. Ahluwalia asserts that it is hard to imagine that the post-colonial intellectual movement would have been so inspired by post-structuralists like Foucault and Althusser, if the later had not been exposed to post-colonial struggles of Africa (2010: p.598). While the distinction between some critical strands of post-structuralism and post-colonial remain blurred (Hill, 2005: p.150), it is less important to concern ourselves with the 'chicken and egg' question of who came first and who inspired whom, than to highlight the fact that both Foucault and Althusser were not inward-looking theorists. During their lives, both interacted with the ideas, values, cultures, politics and histories of Africa.

An examination of the development of justice- and reconciliation-seeking policy in Kenya through a reading of Foucault and Althusser may give new perspectives on Sub-Saharan Africa. The debate surrounding transitional justice in Africa challenges the tacit assumption that the agent (the African leader) is a passive bystander, and is systematically victimised by the preordained structure of the post-colonial state system and the imposition of international order upon African society (see Brown and Harman, 2013; Taylor, 2004; Young, 2004b). Indeed, since the period of independence, the nature of the states has evolved. Their leaders are now capable of making strategic calculations; of exploiting certain liberal cosmopolitan agendas in foreign policy (such as those of the ICC and TJRC); of hiding under the peculiar cloak of post-colonialism by romanticising the uniqueness of African societies, and of rejecting a wider call for reforms and denying the IDPs' rights.

As is demonstrated later (in Chapters 2, 3, 4 and 5), the position taken by the Kenyan ruling class and the IDPs in pursuing justice exhibited a mixture of possible motivations, including the desire for reconciliation and to confront the past atrocities. Many members of the ruling class wished to strike a political bargain in exchange for justice in Kenya (Brown and Sriram, 2012: p.260). Hence, the cautionary tale of Kenya serves as a reminder to international policymakers to reconsider the political danger of integrating Africa's democracies (such as Zimbabwe, Libya, Mali and Ivory Coast) into a global constitutional project of humanitarian intervention and implementing measures for dealing with mass atrocities.

Those who have argued that transitional justice is a simple legal measure for dealing with crime faced a continued criticism from the contemporary legal commentators on

the limitations of transitional justice in achieving its desired objectives (Sriram et al., 2011: p.357; Thomson and Nagy, 2011: p.27). Additionally they have received general criticisms for the fact that certain post-conflict resolution models (such as power sharing) applied in recent electoral violence cases interacted with various transitional justice mechanisms (ranging from prosecution to the establishment of a truth commission), which required further considerations of the political implication of these models which are not necessarily exogenous to the local process itself (An-Na'im, 2013; Bell, 2009; Clark et al., 2009; Grodsky, 2009b; Mani, 2008; Miller, 2008; Nagy, 2008; Raddatz, 2013).

As will later be discussed in Chapter 5, evidence from the TJRC's proceedings in Kenya has confirmed that while the 'increased judicialisation' of the means of dealing with mass atrocities has marked the imperative locations of global constitutional order as imposed by international policymakers, the corrective approach to the flaws of one-size-for-all solutions has not only repeatedly failed to recognise the problem to maintaining peace by using a top-down approach, but that these flaws are also apparent in the form of legal pluralism (Vandeginste and Sriram., 2011: p.500).

'Pluralism' is used here in the sense that various transitional justice mechanisms 'represent a diversification and localisation that moves away from international centralized modes of justice', and that what is comprehended as rooted from Africa 'operates alongside formal institutions, whether national or international' (Nagy, 2013: p.81). In such instances, legal pluralist approached to transitional justice resembles the dual practices of law and political order during the colonial time.

By demonstrating the political impediment and calculations behind the transitional justice experiment in Kenya, this thesis embraces the ‘call for a dialogue’ between the two great disciplines of IL and IR, so they may benefit each other (Sriram., 2006a: p.475). Navigating the conflict between law and politics in analysing transitional justice through the lens of peacebuilding may seem counterproductive. However, conflict itself is a form of “dialogue”, and recognising the tension between both disciplines may be the first step in moving towards a more pragmatic understanding, dispelling the false hopes created by undelivered and overpromised justice crusaders in post-conflict societies.

G – Structure of the Thesis

To continue our examination of the intersection between liberal peacebuilding and transitional justice, and to conduct an in-depth investigation of justice- and reconciliation-seeking policy in Kenya, this study will be organised in the following way: Chapter 2 will revisit the conceptualisation and criticism of liberal peacebuilding, as well as the practical dilemma of adapting it to African politics. Having considered Critical Peace scholarship (CPS) suggestions about whether to prioritise peace or justice in post-conflict reconstruction. The analysis attempts to contextualise the use of the bottom-up approach, to demonstrate the focus placed on the victim in the entanglement of transitional justice with post-conflict peacebuilding. The aim of this chapter is firstly to highlight the growing intersection between liberal peacebuilding and transitional justice, as both concepts have traditionally been assumed to be isolated from one another. These epistemological discussions help to bridge the gap between liberal peacebuilding and transitional justice, and to demonstrate how both fields were conditioned by the power-sharing agreement that

was used to resolve the 2008 crisis in Kenya. Having responded to some of the major issues that dominate the existing bodies of literature on peacebuilding, transitional justice and power sharing, the process of analysis feeds into that of clarifying key concepts and terms used throughout this thesis.

The second part of Chapter 2 begins with two major assumptions concerning the conceptual framework for the political reading of transitional justice in Kenya as politics through power and ideology. The first is that what is widely perceived as political accountability in the literature of Kenyan politics and post-election violence has not only renewed scholarly interest in political and criminal forms of accountability, but has also helped to unmask the political logic behind the major stakeholders' behavior in pursuing transitional justice as an accountability measure, and implementing it as part of the politics of accountability. Secondly, the increasing demand for accountability after the post-election violence is visible in the ongoing struggle between accountability and impunity.

The final part of this chapter justifies the departure from a theoretical, legal analysis in favour of a more political reading of transitional justice proceedings on a national level. This reading draws from recent transitional justice literature and its critical reflections upon the failure of legal positivism to recognise the political components of justice in post-conflict societies. This chapter's method of adopting various theories rather than a single one draws from various critical strands; as such, the academic exercise carried out in this chapter should be treated as a conceptual rather than a theoretical framework (see Coomans et al., 2009).

Secondly, the major theories or intellectual strands that this thesis draws from cannot be lumped into a single, unified theory, since both Foucault and Althusser perceived their own works as perspectives for advancing the concepts that were pioneered by thinkers such as Frederick Nietzsche and Karl Marx respectively. Both Nietzsche and Marx drew their social observations from the works of Medieval, Greek and Roman philosophers. (see Lecourt, 1975).

Finally, the conceptual framework utilised by this chapter has been adopted in similar, recent critical evaluations of transitional justice literature. As is discussed in Chapter 2, the major works of Moon and Thomson, and their findings on post-conflict justice and -reconciliation policies in Africa were explicit and implicitly derived from the critical strands of Foucault and Althusser. The aim of this chapter is to provide a framework for a specific analysis in the following chapters.

Chapter 3 introduces the background of the case study and analyses the local political milieu that transformed the post-election violence agenda into a transitional justice policy. Adopting a political economy approach, the first part of the chapter revisits the causes of the crisis and the key debates surrounding it in order to identify the key issues to which those ruling elites responsible for the development of coherent transitional justice mechanisms must respond. This part also identifies the major political challenges facing the development of transitional justice mechanisms at the national level. Two transitional justice mechanisms—the ICC and TJRC—are focused on specifically. The aim is not to provide an in-depth analysis of both mechanisms, but simply to depict the situation of the country immediately after the 2008 elections and the contextual locus of the implementation of transitional justice as part of the

recurring pattern of impunity and historical contingency in Kenya. This establishes a launching pad for the next chapter's focus on the 'invisibility' of the IDP as an agent, the purpose of which is to attempt to provide an understanding of the local political process and its complex role in establishing reconciliation, claiming justice and countering impunity.

Chapter 4 deals with the everyday resistance of the IDPs to the hegemonic discourses of accountability and impunity exhibited by the ICC proceedings in Kenya, and Chapter 5 illuminates the ideological apparatus of the TJRC's proceedings as perceived by those who testified at the proceedings. Chapter 6 will revisit the key findings, and re-summarise the main arguments that are explored in this thesis.

H – Methodological Consideration and Limitation

I) Exploring the Secondary Literature

In conducting the research for this thesis, the methodology that was adopted can be divided into two main parts. The first involved a use of secondary literature, and an in-depth survey of the more widely-discussed themes in the study of transitional justice and the 2008 crisis in Kenya's political economy. There is an expanding body of literature covering models of conflict resolution adopted in resolving election disputes, and its immediate and long-term impact on the sustainability of peace and reform policies in Kenya, Zimbabwe, Ghana, Mali and the Ivory Coast. As such, the increasingly common pattern of attempting to resolve election disputes or other democratic crises by engaging in broad, sweeping debates about peacebuilding, law, human rights and post-conflict tribunals has been discussed in Chapter 2.

The primary aims of Chapter 2 are twofold. First, it calls for the recognition of the growing intersection between liberal peacebuilding and transitional justice, as has been discussed by various scholars, whose works engage with the major themes relating to electoral violence, peace agreements, peace processes, human rights prospects, the rule of law and bottom-up approaches to peace and justice in Africa. Such works have become primary references in the revisiting and critiquing of liberal peacebuilding, power sharing and transitional justice in Africa.

The contributions of CLS and CPS have inspired further criticisms of the shortcomings of the existing post-conflict literature, which traditionally perceives transitional justice and liberal peacebuilding to be isolated from each other. They are connected, however, through these two fields; both disciplines focus on the victim, the post-conflict zones and the effects of a protracted transitional period as their primary sources of debate.

Secondly, the final part of Chapter 2 introduces the reader to key political and legal theories surrounding transitional justice, and engages in an in-depth discussion on applying Foucault and Althusser's works in an attempt to construct a conceptual framework for transitional justice theory in Kenya.

The second major components of the secondary literature detailed in Chapter 3 focuses specifically on changes made to the continuity of Kenya's political economy during and after the crisis, and the effect of the justice- and reconciliation-seeking policy implemented after the KNDR agreement. This allows for a further evaluation

of the political logic behind the spatial and temporal structure of the transitional justice mechanisms implemented in Kenya. As such, this thesis proposes an examination of the three main subjects of research; (a) African politics as related to specific predicaments in contemporary Kenya; (b) the locating of specific anomaly of the local processes that can be connected to the global literature of transitional justice and post-conflict peacebuilding; (c) and the analysis of the specific forms of power and ideological apparatus used in socio-legal attempts to address the post-election violence, which can be connected to existing critical approaches to political and legal theories. Nevertheless, the predominant critical approach used to evaluate the various secondary references used in this thesis allows it to advance a conceptual framework for evaluating Kenya's justice- and reconciliation-seeking policy, and to identify the actual location of the subject and actors by means of primary data collection.

II) Conducting Fieldwork: Semi-Structured Interviews

In addition to drawing from existing works of secondary literature, this thesis recognises the recent critiques made by a contemporary Kenyan writer, Ngugi wa Thiong'o that: 'there's a tendency to assume that knowledge, education, jurisprudence, and especially philosophy came from the pen. This is because knowledge, the world over, reaches us through books' (2013: p.158). Although text has existed for a relatively brief period in human history, there is a tendency in today's society to assume that 'a person who cannot write and read is ignorant, or that the knowledge they possess is not good enough for sharing with others or benefitting the nation' (p.158). This was the case for the individuals who were identified as victims or displaced after the post-election violence. They were excluded not for being illiterate, but because their unrecorded living experience during and after the

violence challenged some of the major assumptions of secondary literatures (fieldwork note no. 2, Rift Valley, March 25, 2012).

In this respect, the second part of the methodology adopted by this thesis is based on the qualitative process of how transitional justice came into being following the post-election violence. It also explores the underlying logic behind implementing transitional justice within what are identified by the secondary literature as peacebuilding practices (Chapter 2), as a basis for which the Kenyan government manipulates justice- and reconciliation-seeking policy (Chapter 3). This section examines the power relations and ideological apparatus upon which this policy is grounded, and with which it interacts with the victims (Chapter 4 and 5). The evidence will be provided in the author's personal observations of TJRC operations, and of public opinion of the ICC's proceedings.

III) The Fieldwork Periods and Locations

This thesis constitutes the first in-depth analysis of the entire transitional justice process and the debates surrounding it in Kenya from the perspective of the displaced victims of post-election violence, especially the IDPs. I began my fieldwork in February 2009. The previous year, the KNDR agreement had been signed, and the ICC started its investigation following the rejection of a local tribunal bill by the Kenyan parliament. Additionally, the TRJC's mandate for executing restorative and redistributive justice became effective. The second period of fieldwork began in January 2012. At this point in time, the ICC's Pre-Trial Chamber II confirmed the charges against four of the six post-election violence suspects (Chapter 4), and scheduled its first trial date for April 2013.

The second period of fieldwork ended in May 2012, when the TJRC's reports were still pending. The final period of fieldwork ran from February 2013, a month before the election, to April 2013, when the ICC's proceedings were still ongoing. The research draws from 157 interviews with individuals from all of the relevant categories of stakeholders in the constitutional implementation of the TJRC and the ICC's proceedings. These individuals range from officials who were indirect and directly involved in implementing the aforementioned mechanisms, to academic commentators, NGO personnel and the ordinary citizens who were affected by these mechanisms. The interviews consisted of both formal and informal conversations (including multiple interviews with many of the same individuals, some of which span a period of more than four years) in order to provide a broader perspective of the initial intentions, modus operandi and outcomes of the transitional justice mechanisms implemented as a result of the KNDR agreement. This allows the thesis to construct popular narratives of justice and reconciliation in Kenya, conducted by the author during thirteen months of living and interacting with various Kenyans. Research took place while the author was stationed at the Young Women's Christian Association's (YWCA) hostel on Nyerere Road in Nairobi; the British Institute in Eastern Africa in the Kileleshewa district in Nairobi and a tea and flowers smallholding in the Central Province of Kenya. The interviewees came from various groups of stakeholders, such as Kenyan government officials, US embassy personnel, AU personnel, TJRC officers from the research division, the audience and participants in TJRC hearings from various regions, members of small business communities in Nairobi, academics from the University of Nairobi and the United States International University based in Nairobi, and various international and local NGOs personnel.

Finally the author travelled to The Hague, Netherlands to interview individuals who had been witnesses to the ICC's proceedings, SCSL (Sierra Leone), ITL (Lebanon) and ECCC (Cambodia). These individuals were asked for their opinions on a wide range of issues influencing Kenyan criminal accountability and the workings of justice- and reconciliation-seeking policies under the KNDR agreement. The author also travelled to Geneva and Paris to interview former international policymakers and observers from various UN agencies and organizations related to transitional justice. Finally, the author travelled to the AU headquarters in Addis Ababa, Ethiopia to gauge the views of the individuals residing in this region towards the precarious Kenyan approach to transitional justice.⁷

IV) Epistemological Inquiry in locating the Research Subject: The Bottom-Up Approach and Everyday Resistance

The number of interviews in which the respondents who considered the interview questions from the perspective of a victim was around 103 IDPs. In this section, I first clarify what does I means by bottom-up approach and everyday resistance, and secondly, how does this can be connected to the IDPs.

i) The-Bottom Up Approach

In the next Chapter 2, I elucidates in details on the problems with liberal peacebuilding approach to navigate post-conflict society in Africa. However, suffice to say for time being, that such problems and criticism with the liberal peacebuilding projects in Africa have lead to the growing and shifting preferences on the Critical

⁷ The foreign diplomatic, government and AU personnel shall not be identified, in accordance with the agreement made prior to the interview that their public positions would be protected and the confidentiality of their views respected. However, the information gathered from the interviews has been given permission to be cited. See Wengraf, 2001.

Peacebuilding scholarship (CPS)⁸ that lead by the recent publications of Oliver Richmond in order to probe the question of peace and justice at the local level. I believe the Richmond's suggestions of probing the question of peace and justice beyond the surface of national and international elites leads to recent attempts and criticisms to consider the bottom-up approach in research methodology or evaluating the international template of peacebuilding and transitional justice agendas. As such, a detailed discussion below served as the epistemological entry point to theories about a bottom-up approach or a justification in investigating the victim perspective on the issue of peace, justice and reconciliation.

In critiquing liberal peacebuilding projects in Africa and other conflict zones, recent studies have proposed a new direction of research inquiry; 'a local turn in peacebuilding' (McGinty and Richmond, 2013: p.763.) by using what termed as 'post-liberal peace' (Richmond, 2011: p.10). Post-liberal peace should not be read as an 'alternative' trajectory, replacement or solution to the existing liberal peacebuilding deficiencies in the form of binary opposition, but as an epistemological means of 'rescuing' liberal peacebuilding from becoming 'illiberal' in the wake of its failure to genuinely engage with the various local actors, including subaltern agent and everyday/infra politics (p.11).

In this thesis, I borrowed Richmond's post-liberal peace as a key to understanding the position of the IDPs as subaltern agents, victims or survivors of post-election violence position themselves within the political elite's game of brinkmanship. As such, this allows me to contextualise the IDPs perspective as victim in assessing or evaluating

⁸ For a useful discussion on the CPS, see (Richmond, 2008; Richmond, 2010)

the outcome of the liberal cosmopolitan templates of transitional justice institutions upon the everyday life or infra politic of the displaced victims in Kenya.

Meanwhile, in a recent scholarship of transitional justice, there is a nuance call on integrating those various actors' perspectives at the local level or under the surface of the national elites in order to provide more precise understanding on the livelihood of the victims after conflict or during the implementation of the transitional justice institutions itself. For instance, in Susan Thomson's study (2011) of the livelihoods of peasants in post-genocide Rwanda, term like 'subaltern agency', and 'everyday resistance' provide an avenue of inquiry for validating any claims about peace and justice made exclusively by state policymakers or international actors, and allow further examination as to why and how the Rwandan state's narrative of justice and reconciliation for victims contradicts the everyday understanding of justice among the ordinary populace (p.446). As later discussed in Chapter 4, Kenyan IDPs understanding of peace and justice consists of avoiding discussions of the ICC's proceedings and employing non-cooperative means including "telling lies" as a strategic calculation to survive in a hostile camp environments.

In this regards, I believe that a CPS' call for the local turn in researching peace as well as identifying the location of human rights victims as the agents of the outside the surveillance of those who occupy the apex of the state in transitional justice research arguably could be considered as a bottom-up approach⁹. In the context of African conflict zones and weak projection of the nation state building, the idea of probing beyond the surface of nation elite has attracted the attention of many commentators

⁹ Similar themes of research has been encouraged and hinted by recent trends in peacebuilding literature. For example see, (Bush and Duggan, 2014)

since the growing call for ‘African solutions to African problems’ (Murithi, 2008: p.28), post-colonial perspective (An-Na'im, 2013: p.200), *Ubuntu* approach (Hoppers, 2013: p.72), neo-traditional frameworks (Kwasi Theku, 2012: p.38) or other non-state initiatives (Taylor, 2013: p.455.) that are not necessarily appealed the deeper philosophical inquiry of indigenous. It has also been contributed to by the growing number of individuals who received their educations from Northern institutions but who originated from the South, in which they developed their innovative readings of western political theories and their application to non-western societies (McGinty and Richmond, 2013: p.776). While it will be beyond the scope of this thesis to investigate all that can be regarded as an alternative to the top-down approach to peacebuilding and transitional justice, my focus on the IDP as one of the many victims and survivors for human rights violation should served as a point to reminds us on the victim’s perspective, as well as the complexity of defining a success story of post-conflict reconstruction policy if we abandoned their perspectives.¹⁰

Meanwhile, it is always problematic to easily grasp the positions of the IDPs as subaltern agents, or to simply describe them as ‘local’ because of the existence of various local agents within a plural society.¹¹ Additionally, their contested identities and socioeconomic positions during and after conflict transitions are fluidly interchangeable and cannot be sociologically claimed as deeply rooted from Africa and predating the colonial period (Lynch, 2011c: p.391). However, what matters here,

¹⁰ In the recent literature of transitional justice, there is a growing call for recognising the important of the victim’s perspectives as one of the ways to value the legitimacy of its institutions in the midst of unclear regime change. For example, see (Hansen, 2014)

¹¹ While I recognise the shortcoming of relying on the one single group perspective of the IDPs and the existence of various groups at the local level, including the fluidity of their identities in projecting their existential claims to certain issues in rights and injustice, the adoption of the IDPs here should be affirmatively accepted in order to justify the existence of multiple perspectives below the radar of the national elites and some of these perspectives challenges the official narratives prescribed by the ruling class. See also (Lynch, 2011a)

the vulnerable position of the IDPs as one of the human rights victims could and should be regarded as the subaltern agents¹² in providing a different narrative about peace and justice in order to reveal the actual gap between what were commonly understood from top-down and bottom-up are always varied and need to be considered. Simultaneously however, the IDPs perspective here should not be viewed as simply non-liberal, nor should be suppressed by the ruling class or ignored by the international policymaker, but should be recognise and integrated to help mitigate and improvise the shortcoming of transitional justice institutions or national peacebuilding projects (Chandler, 2013: pp.22-25; Hellmüller, 2013: p.25; MacGinty, 2011: p.15).

The term ‘local’ here to avoid any confusion between liberal and illiberal, or international-modern and local-traditional values (Richmond, 2011: p.42). ‘Local’ refers to the actions of a local agent on a national level (in relation to the political elite), and as a partner to international peacebuilding and transitional justice agents (p.42). Additionally, the term local-to-local’ (critical agent) is used to recognise the existence and unique positions, including individuals and communities (p.46). In this thesis the term subaltern agents, critical agents and local agents will be used interchangeably in order to refer the displaced victims of the postelections violence or the IDPs, which means while their exist at the peripheral level and process within the confinement of the transitional justice institutions and become a primary object of human rights violations, their views and livelihoods have not been fully considered by the international or national elites, or even be able to excise their fully individual agency capacities in describing the term peace, justice and reconciliation.¹³

¹² Similar approach have be considered in other empirical research in transitional justice, see (Ingelaere, 2008)

¹³ For a useful discussion on a research agenda of the transitional justice from below, see (McEvoy and McGregor, 2008)

Given the importance of local or subaltern agent in CPS literatures, this thesis argues that the existence of such actors—the displaced victims or the IDPs—of the postelection violence are vital key actor in assessing the viability of justice- and reconciliation-seeking policy in Kenya. In such instances, post-conflict environments become a conflict zones for power contestation, in which the interaction between various actors (international, local elite, civil society, victims and survivors) and various post-conflict justice institutions displays the hybrid features of the relations, processes and mechanisms involved. Conducting a bottom-up research and recognising the existence of the critical agent allows us to avoid falling into a trap of framing the relations in a simplistic context of international versus local (Belloni, 2012: p.25; Hensell and Gerdes, 2012: p.156). This brings my next discussion to position the location of the IDPs or subaltern agent here with the concept everyday resistance or infra politics.

ii) The Everyday Resistance and the Placement of the IDPs

In the scholarship on comparative politics, rural resistance to state authority has been one of the dominant analytical frameworks through which governance is assessed (Scott, 1998; 1990; 1985). Resistance to state power has been used as a means to explain social relations in both the colonial and post-colonial periods, highlighting how the policies of a strong centralised state have been ignored, subverted or altered when they are applied at the local level.¹⁴ As a consequence of calling for more flexible and innovative method in assessing the everyday living of the victims of human rights violations and political violence, there is a growing scholarship within

¹⁴ For a useful reading on the formation of identity and everyday form of resistance during the colonial period, see (Maddison, 2013; Rolandsen and Leonardi, 2014; Vorhölter, 2012; Wolff, 2003)

recent empirical research of transitional justice to focus on the ways in which post-conflict communities operated in situations of severe social constraint, examining the exercise of state power on these communities through the application of James C. Scott's account of 'everyday resistance'.¹⁵ In Scott's account, peasants resist the imposition of centralised power through discursive practices and passive activities that oppose state policies.

I believe that it is both possible and necessary to nuance this current use of the notion of resistance by introducing an ethnographic analysis, semi-structure interviews or informal conversation of several individual who resisted state-supported violence – in this instance of my research the interviewed IDPs who directly challenged the state policy of reconciliation and national unity at crucial points of political contestation in recent Kenyan 2008 crisis. Examining the ways in which their resistance was enacted allows us to understand better their subsequent engagements with the way transitional justice institutions corresponds to them. Such analysis provides both passive resistance like “telling lies” and an archetypal example of active resistance through voting for the ICC suspects during the 2013 election (Chapter 4).

Scott's notion of 'everyday resistance' has been drawn on extensively to examine opposition to state power in northern Malaysia. As a result his work provides a necessary starting point for a discussion on the place of the IDP in the current theories on political resistance and the value of understanding resistance in transitional justice research. In his account of everyday resistance, Scott focuses on a vertical power relationship with one set of actors in a clear subordinate relationship to another

¹⁵ For a recent scholarship that utilised the Scott's theory of resistance in transitional justice research, see (Ingelaere, 2010; Palmer, 2014; Thomson and Nagy, 2011)

dominant group. For Scott, hidden transcripts of resistance develop and emerge from within this subordinate group. At moments of revolt, this subtle and on-going resistance is replaced by open defiance with ‘the hidden transcript storming the stage.’ Active resistance manifests as a collective social product built through the ongoing experience of oppression, in which an individual or a group speaks for an entire underclass.

Having developed these initial ideas through a detailed ethnography in the village of Sidaka in Malaysia, in his later work Scott generalises his findings to argue that the degree to which ‘structures of dominance can be demonstrated to operate in comparable ways, they will, other things being equal, elicit reactions and patterns of resistance that are broadly comparable’ (1986: pp.30-34). It is in this realm that Scott’s work has been understood to contribute to the broader theoretical notion of what it means to resist and has been used to interpret empirical data on social relations in recent scholarship of transitional justice research, in particular of post-genocide Rwanda.¹⁶

In the specific discussions on resistance in the post-genocide period, the positioning of Scott’s notion of the dominant and subordinate is framed in terms of the state, in the position of power, and the rural community, in the position of subordination. The emphasis is on the structure of hierarchical power relations; however, this requires an unavoidable level of simplification that risks obscuring individual action. For example, from the outset such a reading of resistance by a rural group against a ruling elite assumes a level of homogeneity and equality inside of these two groups. While it

¹⁶ This approach is very much in line with current CLS in which one case can constructively be used to explore the broader practice of international criminal law, see (Drumbl, 2012)

fails to account for the social reality that within the political orderings of the subordinate group there may be forms of exclusion that lead to other possible points of political contestation (Palmer, 2014: p.237.) However, this work allows us to disaggregate the ‘subordinate group’, making visible the individual experience of power relations in post-conflict environment, both as exercised in the past and as experienced today. It enables us to see how relationships of power are experienced, transmitted, and changed by individuals in their everyday practices (interview with IDP no. 102, Rift Valley, March 22, 2013). In doing so, the aim of my research is to focus in detail on how an individual is able to exercise power while being subject to state authority.

Similar themes of everyday resistance among the peasants in the post-genocide Rwanda have recently expanded by Thomson latest works that identify the form of everyday resistance among the Kenyan Somalis women in Kenya (Thomson, 2013a: pp.589-609). To this date, this is the only work that brings the predominant theme of everyday resistance from the subject of comparative political research on peasant society in developing country to innovative reading of the refugees or victims of human rights violation, as well from the specific focus on Rwanda to Kenya. As such, I believe that these scholarships could served as an entry point to locate my research focus on the IDPs narratives from the post-election violence as the critical agents to the ICC’s and TJRC’s proceedings.¹⁷ As further hinted,

The key to grasping the dynamic possibilities of human agency is to view it as composed of variable and changing orientations within the flow of time. Only then will it be clear how the structural environments of action are both dynamically sustained by and also altered through human agency – by actors capable of formulating projects for

¹⁷ For past three to four years, the IDPs that I have met provides me with similar ideas of rejections upon both transitional justice institutions in Kenya. Throughout my engagements with them, they expressed both active and passive resistances upon the official narratives of justice and reconciliation that were claimed by the ruling class in Kenya.

the future and realising them, even if only in small part, and with unforeseen outcomes, in the present (Emirbayer and Mische, 1998: p.964).

For both scholars, individual action are crucial to understanding the vertical relationship between dominant and subordinate groups. In addition, the agency of a single person, acting within the structures of power, is more visible when viewed across an extended period.

As noted above, Scott's theoretical work on resistance draws crucial attention to power relations between groups. Theoretical writings that build on Scott's initial insights reinsert individual choice into the discussion on resistance and highlight the importance of a temporal examination of these choices (Ortner, 1995: p.175.)

While critiques may argue that reading the few individual narratives from the IDP camps do not establish a generic pattern of the whole idea of resistance or rejection of the entire society upon the ruling class or international agencies, but it does complicate our understanding of IDPs resistance to state power.¹⁸ Firstly, it challenges the dominant focus on top-down power structures in understanding resistance to transitional justice policy in Kenya, and re-introduces the individual into the picture of the exercise of power in Kenya today. Secondly, it shows the importance of local power differentials within the IDP communities in understanding how resistance is enacted in practice. The subordinate group should not be viewed as automatically homogenous or unified, either within ethnic or socio-economic groups. Finally, as a personalised and deep life history, the IDPs that the author spoke too introduces a crucial focus on the normative dimensions that underpin resistance. This

¹⁸ If there is a sense of disagreements and rejections, and yet have not been considered or by worse, 'silenced' by those in power, it is a clear case of 'politics' and perhaps explain why the transitional justice institutions in Kenya is on the brink to failure.

understanding calls us to ask in a detailed and grounded manner, why and how a particular government policy is resisted. It is with this cautious approach in mind that we should analyse and describe the extent to which Kenyan ruling class' politicisation of transitional justice institutions and the ICC's limited focuses on retribution justice are being resisted, with the goal of providing a more nuanced explanation of popular motivations.

Hence, what is identified in the previous section as the bottom-up approach, which entails using the perspectives of those who were directly subjected to violence namely the IDPs. Thomson argues that the key to uncovering the act of everyday resistance lies in the concept that the weak party (critical agent), in its resistance to the dominant power (the agency of the state and its power representations) are not truly weak, and that weakness and power occupy relational positions (2011: p.449). Thus, the act of everyday resistance uncovers the extent of the power relations between the strong (dominant) and the weak (dominated) and, because these power relations are not static but ever-shifting, the critical agent that is 'deemed' to be weak cannot be permanently subject to this definition (p.450).

In contrast to open confrontation, everyday resistance is a form of non-direct confrontation that is sustainable in a highly structured environment. The critical agent can achieve its goal of confrontation when its motives are not easily identified as conforming to systematic patterns of opposition to government policy or transitional justice mechanisms.¹⁹ Indeed, Scott's observations of farmers living in the state of Kedah, northern Malaysia in the 1970s, have confirmed that the expression of popular

¹⁹ The aims of everyday resistance are to keep those in power in a 'blurred zone', where the authority is constrained to prosecute those who belong to the anti-establishment movement. Similar themes have been identified in James Kariuki's biography, 2001.

resistance on the part of victims or marginalised members of society reveals the extent of state institutional oppression. It is also relatively effective in attaining the particular goal of objection, so that the critical agent may capitalise on its position and challenge the state's dominant narratives about prosperity, peace, justice and economic empowerment (1986: pp.30-5).

V) Why Interviewing the IDPs?

Having resolved the key concepts of bottom-up approach and everyday resistance, in this section I first briefly explores the term 'IDP' in order to highlight the legal and political shortcoming in recent attempts to safeguard the livelihood of the IDPs in Kenya, as well as a further explanation on why my research focuses on this displaced victims after the post-election violence. Secondly, I briefly discuss the types of the IDPs in Kenya, and the actual method in collecting data, in term of how I access or speak to those IDPs for the last three to four years.

i) International, Regional and National Legal Frameworks on the IDPs: Displacement and transitional Justice

The concept of the IDP emerged in the last decade of the 20th century to distinguish those displaced people that have similar humanitarian needs as refugees, yet remain within their national territory (Schrepfer, 2012: p.668). Until the beginning of the 1990s, IDP were defined negatively: they were people who had fled their homes, but who were not refugees (having remained within their country) (Phuong, 2004: p.1). It is only recently that some efforts have been made to devise a comprehensive definition of IDP. An important step was taken in 1992 when the UN Secretary-

General proposed a working definition. That definition was revised in 1998 and the *Guiding Principles on Internal Displacement* now define IDP as,

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised state border (U. N., 1998).

Eventually, through the revised edition of the same document, they were given international legal recognition with the publication of the document in 2001 (Phuong, 2004: p.2). This allowed for the international community to provide protection and humanitarian relief under the principle of neutrality, without undermining the sovereignty of states. In short, without the agreement of the warring factions, the state and armed groups, IDPs are vulnerable to attack and also to neglect in post-conflict reconstruction policy, depending on the success of the group to which they were perceived to be aligned (Souter, 2013: p.173). Either in general or specifically to Kenyan situation after the 2008 crisis, there are various reasons why this thesis have choose the IDPs as a primary source of data collection, which will be discussed in turn.

Firstly, whereas the number of refugees assisted by the Office of the United Nations High Commissioner for Refugees (UNHCR) had fallen to 10.6 million by the end of 2002, the number of worldwide IDP was estimated to be about 20-25 million at the same date (see Table 1.1 in U.N.C.H.R., 2002). IDP not only outnumber, by far, refugees, they also raise some of the most urgent human rights and humanitarian problems²⁰ of our time and present a serious challenge to prevailing conceptions of sovereignty and intervention. Meanwhile, while the displacement have been one of

²⁰ For a useful discussion on a recent works on the IDP's implication and regional stability, see (Souter, 2013)

the continued themes in Kenyan politics, intersected with ethnically charged of electoral violence and land clashed since the colonial era, the democratic crisis estimated the bigger number of IDPs and worsen the existing unresolved displacement populations (Klopp, 2006: p.72).

While the actual number released by the Kenyan officials is disputed²¹, various agencies indicated a bigger number of displaced victims that originated from the 2008 crisis. For instance, following the 2002 elections, the only international organisation based in Geneva that monitored the IDPs' situations in Kenya, the Internal Displacement Monitoring Centre (IDMC) estimated around 350, 000 victims from the electoral violence of the 1992 and 1997 remained homeless and were forced to migrate in the illegal settlements or new slums closed by to Nairobi city (Internal Displacement Monitoring Centre, 2004). In regards to greater democratic and constitutional reforms that took place in 2005, the IDMC seek clarifications on the status of female and underage IDPs during the fifth and sixth periodic reports submitted by the Kenyan government to the UN *Convention of the Elimination of All Forms of Discriminations against Women* (CEDAW), but none of the responds made by the Kenyan government matched the actual reality of protection improvements among the IDPs that they promised (Internal Displacement Monitoring Centre, 2007a). By December 2007 crisis, IDMC estimated 600, 000 IDPs produced by the new wave of electoral violence (Internal Displacement Monitoring Centre, 2007b). By early 2008, despite the Kenyan official claimed of active resettlement of the IDPs camps, nearly 650, 000 remained homeless and living in the worse environment with

²¹ Various international agencies have disputed the actual numbers of the IDPs by the Kenyan government because it doesn't reflect on the actual IDPs populations from the 2008 crisis, see (Juma, 2013)

few access to the medical facilities (Internal Displacement Monitoring Centre, 2010b).

While the IDMC, UNCHR with other local NGOs have constantly called for the government immediate attention of speedy reforms and durable solution²² to the growing numbers of illegal settlements, many that were interviewed by the IDMC and Human Rights Watch remained homeless and subject to various risk of violence (Kamungi and Klopp, 2008: pp.52-53). In the 2010 IDMC General Report, the organisation indicated around 250, 000 IDPs in various parts of the country, especially in Rift Valley province, subjected to the risk of discrimination, absence of physical security, and limited access to medical, clean water and shortage of food (Internal Displacement Monitoring Centre, 2010a). Most of these IDPs are from the 2008 crisis and while the immediate violence have ceased, their livelihood remained in fear and some of them that met with the author have either still waiting for the promised money to buy the land for resettlement, or have been forced to resettle in a new place without any security assurance of their political and socioeconomic livelihoods (interview with IDP no. 100, Rift Valley, March 22, 2013).

In addition, to the existing IDPs from the 2008 crisis, Kenya is few of the African countries that witnessing a rapid urbanisation with poor legal framework for land entitlement and people resettlement schemes. In the study conducted by the collaboration of researchers from the IDMC, Overseas Development Institute (ODI) UK, and Berkeley University, California US (Metcalf et al., 2011: pp.31-33), a

²² As stipulated by the UN Guiding Principles, 'durable solution' is a legal termed in the international regulations that referred to the widely and understandable concepts on how to resolve the IDPs' situations. In this respect, it refers to, a voluntary resettlement, fully participation in making decision on resettlement scheme, fully consultations, no coercion including physical and sexual abuses that lead to human rights violations, see (Brookings Institution, 2007)

report have been produced on the status of urban resettlement and city sanctuary for the city of Nairobi.

In that report, what remained disturbing is that the Kenyan government official claimed that they have successfully resettle the IDPs from the 2008 crisis by demonstrating the number of camps that have been closed down. However, the study discovered that huge numbers of IDPs that previously occupied the camps around Nairobi and southern Rift Valley have been forcefully migrated to the slums nearby in Nairobi, triggering the huge number of illegal slums, coupled with the new wave of homeless individuals from other rural areas due to the urbanisation²³ and a massive construction of foreign private projects in rural cities. The research also discovered that those previous IDPs that are now resettled in slums like in Mukuru²⁴, Mathare, Dandora and Korogocho have difficulty to access to justice, security, job opportunity and medical needs, especially when they cannot legally be identified as IDPs which means their existing humanitarian needs have been compromised and subjected to civilian status as an illegal settler.

By June 2014, the IDMC latest reports indicated that there is no official, comprehensive, up-to-date national data on IDPs in the country. Data gathering has focused on instances of fresh displacement caused by violence or rapid-onset disasters with little quantitative and qualitative data on displacement dynamics after IDPs'

²³ Recent study also have shown that due to the rapid urban developments, Kenya's rural areas suffered from the unintended consequences of limited fertile lands for individual ownership, community farming and this pushed some to move to the nearby slums in Nairobi with uneven development facilities and infrastructures to equips such demanding needs of proper resettlements, see (Hope, 2013)

²⁴ Through the author's first interaction with the residents of the Mukuru slum in 2009, some of them later informed that they are previously lived in the IDP camps before their camps was closed by the government, and eventually some of them introduced the author to their families and friends that still lived in the self-help camp in Rift Valley (interview with IDP no. 1, Rift Valley, February 9, 2012).

initial flights. The most recent informed estimate—provided by UNHCR in January 2013—of 412,000 IDPs does not include those displaced by natural disasters, development projects and pastoralist IDPs (Internal Displacement Monitoring Centre, 2014). Nor does it include any of the estimated 300,000 people who fled post-election violence in 2007/2008 and who are usually described as “integrated” IDPs.

Secondly, the refugee definition contained in the 1951 Refugee Convention, as modified by the 1967 Protocol, indicates that IDP not refugees because they are still within their country of origin (Phuong, 2004: pp.5-6). They have not crossed a frontier, which is a precondition of refugeehood. While not defined as refugees, IDP have been dealt with by refugee structures such as UNHCR which provides protection and assistance to them (mostly in returnee-linked programmes), when they are found in the same areas as refugees, and when it considers that this forms an integral part of a comprehensive solution to the refugee problem. However, some concern has been expressed over such arrangements. IDP is linked with the refugee problem, in so far as it often constitutes a preliminary step towards external displacement, but the phenomenon also has specific characteristics and can raise special problems which cannot be solved by traditional methods of protection used in the refugee context (Daley, 2013: p.894).

Internal displacement constitutes a distinct problem which has to be dealt with not only in conjunction with the refugee problem, but also separately as it raises issues of a different nature. As a consequence of to the obscured legal status of the IDPs, the Kenyan government has not proven to be really effective in ensuring their safety (Internal Displacement Monitoring Centre, 2012). Manipulating the legal loopholes

between the status IDPs and homeless citizens provides the political opportunity for the government to closed down many IDP camps as a pretext to reduce the government responsibility in ensuring their legal and political commitments upon them.²⁵ As such, the IDPs living in protracted displacement continue to identify as protection concerns inadequate access to land, basic services and livelihood opportunities. Many IDPs are displaced in areas of the country that are environmentally and economically vulnerable and thus enjoy fewer opportunities for integration and development. As such in this thesis, the IDPs that the author interviewed are those that either still living at the camps in different parts of the Rift valley (in particular the self-help camps), or have been force to migrate to illegal settlements or slums around Nairobi, and this bring to next reason why this thesis focused on such vulnerable people.

Thirdly, Africa has been plagued by many problems throughout its modern history. The problems have ranged from conflicts, to bad governance, to violations of human rights, to natural disasters. One of the current problems that many Africans encounter is forced displacement, which remains one of the most daunting challenges facing the African continent (Birganie, 2010: p.183). Whereas the number of refugees has seen a sharp decline, due in large part to the diminution of inter-State conflicts, the number of IDPs in Africa has increased substantially and, with it, the plight and suffering of the peoples of the continent (p.182).

The AU and its predecessor, the Organisation of African Unity (OAU), have tried to

²⁵ By closing the 2008 IDP camps, the government announced in June 2008, as well as in July 2013 that all the IDPs related to the 2008 crisis were fully resolved, but research have shown that those IDPs mostly either refuse to return back when they came from or to be resettled at the slums, and as such cannot be legally identified as an IDP, which ceased their humanitarian needs as enshrined by the Kenyan 2012 IDP Act, as well as by the *UN Guiding Principles on the IDPs*, see (Metcalf et al., 2011)

address this problem. As far back as 1969, the OAU adopted the Convention Governing the Specific Aspects of the Refugee Problems in Africa, which is considered to be the most progressive international instrument on the phenomenon of refugees (p.182). In keeping with that spirit, the AU has now added another convention to its cache of instruments in an attempt to address the plight of IDPs in Africa. The growth in IDP numbers and their vulnerability may account for the Protocol on the Protection and Assistance to IDP, which was adopted on November 30, 2006 by states of the International Conference on the Great Lakes. Africa-wide recognition came on December 6, 2012, when the African Union's *Convention for the Protection and Assistance for Internally Displaced Peoples in Africa*, which was adopted in 2009, came into force (Daley, 2013: p.895). Yet like many regional legal arrangements, the existence of these legislations has not resulted in marked improvement of the situation of IDPs, and at the moment remains to be seen (p.896.).

The Kenyan government has somehow exhibits 'hesitancy' in signing and rectifying the aforementioned international and regional treaties. Kenya is a member state to the *2006 Pact on Security, Stability and Development* in the Great Lakes Region and its protocols but it has yet to sign and ratify the AU *Convention for the Protection and Assistance of Internally Displaced Persons in Africa – the Kampala Convention* (KC) (Internal Displacement Monitoring Centre, 2014). Its ratification has been delayed by the fact that Kenya's 2010 constitution marked a change in how international and Kenyan municipal law intersect, moving from a dualist to a monist legal system. This required Kenya to pass legislation on domestication of treaties (Kamungi, 2013).

For that, in November 2010, Kenya established a Parliamentary Select Committee on

the Resettlement of IDPs, whose mandate included preparing a draft bill on forced displacement. The draft policy was therefore complemented by the *2012 Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act* (hereinafter IDP Act), which received presidential assent on December 31, 2012. The IDP Act was eventually adopted in December 2012, so the country is now in a position to ratify the above mentioned regional KC but has not yet done so (Internal Displacement Monitoring Centre, 2014). The IDP Act largely reflects key protection principles throughout the displacement process and establishes an institutional framework for IDPs' protection and assistance. However, little progress has been made towards its implementation – in particular the establishment of its inclusive implementation committee, the National Consultative Coordination Committee (NCCC). There has been little awareness raising or publicity about the Act with responsible authorities, the general public or IDPs.

Some now feel that the draft IDP policy has been overtaken by the Act and there would be fewer added values in adopting the draft policy (interview with CIC officer no. 2, Nairobi, February 7, 2012). However, an approved IDP policy would certainly help facilitate implementation of the IDP Act. Both instruments are essential to improve the Government's response to the needs of IDPs and the affected communities. The fast-tracking of the implementation of the IDP Act and policy and the ratification of the KC are some of the recommendations on forced displacement that the TJRC included in its final report (T.J.R.C., 2013: Vol. 4, pp.15-17). Since 2014, responsibility for matters of IDP lies with the Ministry of Devolution and Planning and no longer with the now dissolved Ministry of State for Special Programmes (MoSSP). Operational aspects related to disaster management fall under

the Ministry of Interior (Internal Displacement Monitoring Centre, 2014). Though IDP issues are seen to be a national government responsibility, county and central authorities will have to continue working alongside them to ensure effective management and equitable allocation of national and local resources. Thorough implementation of these legal and policy frameworks is fundamental to ensure real protection of IDPs' rights and prevent further displacement. Again this remains to be seen, and bring this thesis the last final reason in opting for the IDPs as main object of primary data collection.

Finally, in light of the 2008 crisis that lead to greater displacements of various ethnic communities in Kenya, the socio-legal and political attempts that embarked under the KNDR framework provides more instructive opportunities for a greater focus on the IDPs as one of the major identified victims of human rights violation (Zwier, 2013: p.327). In this regards, when the power sharing government were created in Kenya, the agenda item number two of the KNDR were primarily designed to address the immediate attention of humanitarian and resettlement needs of the post-election violence's IDPs (p.328). Subsequently, In May 2008, the government launched Operation *Rudi Nyumbani*²⁶ in an effort to close camps and facilitate the return or resettlement of around 350,000 IDPs (U.N.C.H.R., 2008b). A national humanitarian fund was set-up to fund transport home, (re)construction of houses, livelihoods (in particular farming) and reconciliation initiatives. The international community provided non-food items, shelter and food assistance, supported basic services such as schools and health facilities and strengthened policing capacity in areas targeted by the operation (interview with USAID officer, Nairobi, February 15, 2012).

²⁶ Swahili termed for 'returned home'.

Yet as detailed in the next Chapter 3, the ruling class were heavily concerned with politicising the transitional justice options, and this led to a slow pace of genuine resettlements. IDPs have complained that it did not arrive for months or even years after their displacement. They also expressed concern about protracted land acquisition procedures and discrepancies between central and local databases, which led to the exclusion of certain displaced groups from government resettlement efforts (fieldwork note no. 1, Rift Valley, February 29, 2009).

The *Rudi Nyumbani* operation was also criticised for its bias towards land-owning rural IDPs. Pressure put on IDPs to move out of the camps raised concerns about the voluntary nature of the process (Humanitarian News and Analysis, 2011). As discussed above, a careful look to the nature of the operation revealed that it was intended to swiftly close major IDP camps from the 2008 crisis in order to indicate government commitment to reconciliation and resettlement and yet, most of the IDPs were politically transformed into homeless individuals and few were involuntarily opted to resettle at the slums (fieldwork note no. 2, Rift Valley, March 15, 2012). More could have been done to secure IDPs' substantive participation in the planning and implementation of the operation. Additionally, the government reportedly bought land for resettlement without consulting IDPs who were unable to see the sites in advance in order to assess their viability and security (interview with IDP no. 10, Rift Valley, February 7, 2012). There have been allegations that state officials embezzled funds earmarked for resettlement of 2008's IDPs (Analysis, 2012).

In the absence of the actual transparency and adequate assistance, members of around 7,000 households who had not owned land prior to their displacement organised self-help groups, purchased plots of land and settled less in 20 tents (Internal Displacement Monitoring Centre, 2014). Some IDPs remain in transit camps, while others stayed behind in the camps where they had originally taken refuge. This is particularly the case for those who had not owned land and those who feared new attacks in the absence of meaningful reconciliation with those who had displaced them. Many lack the resources to rebuild their lives and are waiting for the government to provide them with necessary help.

In September 2013, the government announced that it would compensate each of the 8,298 IDP households still living in camps with KSH 400,000 (US\$ 4,600), and close all camps by the end of the month (Kiplang'at, 2013). In October 2013, the newly elected of Kenyan president, Uhuru Kenyatta made a vague announcement that all IDPs had been resettled, though the local human rights groups challenged his statement (Joselow, 2013). However, in March 2014, in a report to the Kenyan parliament the president acknowledged that a total of 777 households had received the cash payments and that the exercise was continuing although not fully (Kenya Today, 2014).

Meantime, despite on-going displacement, levels of service provision and donor attention continue to decline. Several civil society organisations that for years have played a major role in the protection and assistance of IDPs have been left with very limited funding for IDP work (Internal Displacement Monitoring Centre, 2014). For instance, UNHCR's decision in 2013 to stop funding IDP-related activities has had a

particularly negative impact on the activities of KNCHR and knock-on impacts on the activities of the PWGID and of those of some of its members. Moreover, there is a clear gap between short-term emergency measures and the comprehensive medium and long-term initiatives that IDPs need to end their displacement and restart their lives. Within such predicaments, the author have discovered that the IDPs, in particular from the aforementioned of the self-help and transit camps developed a political expression and behavior of frustration and disappointment with the government, especially the local politicians that promised them money or the NGO that represents the ICC's interest for land and other benefits of resettlements. As further discussed in Chapter 4, these politicians used ²⁷ the money for their resettlements in order to garner political supports and votes for the 2013 election, rather than resolving their pressuring needs of resettlements. As discussed as well in Chapter 5, eventually, some of the IDPs that have testified at the national's TJRC, feel being betrayed and opted for the immediate 'financial rewards' from the 2013 election candidates since their expected of reparations and restitutions have not been legally and politically met, even since the truth commission 'closing the book' or finalising the specific recommendation for implementations.

For that, this thesis utilises the 2008 political crisis that plunged the nation with the greater IDPs' situations and their everyday expressions as a way to understand how the intersection between transitional justice and liberal peacebuilding in theory have been energised toward addressing the issues of displacement, since the *locus standee*

²⁷ There is a continued allegations and systematic evidence to suggest that the Kenyan MPs used, delayed and only distributed the IDPs' 'promised money' for resettlement during the election rallies and while some of the allocations were provided through the Constituency Development Fund (CDF), there is wider irregularities in the way this money were transferred from the central fund to the individual MPs' CDF, which allows them to delay and, only distributes the money for garnering votes rather that prioritising the immediate needs of the IDPs, see (Gutierrez-Romero, 2013)

of the IDPs and displacement zones has become part of the liberal cosmopolitan focus on the individual instead of the state as the primary object of morality (Schabas, 2014: p.156). Consequently, the focus on those who were subjected to violence has ensured that: ‘victim’s rights has emerged as a body of norms within the field of international human rights law, international criminal law, determining the treatment and entitlement [of the] victims...’ (Garcia-Godos and Sriram, 2013: p.3).

Nevertheless, the above have more or less indicated why there is a worthy reason to tap into a livelihood of the Kenyan post-election violence’s IDPs, in particular when such displacement issues intersected with the country’s road of building a robust and firm transitional justice institutions in order to coming to terms with the 2008 crisis. While a lot have been written about transitional justice, peacebuilding and IDPs, but few²⁸ actually have given a primary focus on the IDP as an object of victim testimonials within the transitional justice research. The IDP or a theme on ‘displacement has not as of yet figured prominently in the literature or practice of transitional justice’ (Duthie, 2012: p.11). As rhetorically asked by Harris-Rimmer, ‘when and under what likely condition should transitional justice responds to the IDPs?’ (2009: p.1)

Some would answer this by theoretically suggest that the displacement linked to the systematic violations of human rights. Severe violation, systematic killings, rapes and forced migrations that triggers massive numbers of displacement, resulting crimes against humanity that could be accepted as an evidence for the ICC’s proceedings, as well as denied access to justice that could be admitted as a testimonial for the truth

²⁸ Between 2011 and 2012, few workshops have been conducted between the Department of International Development, LSE, University of London with International Centre for Transitional Justice, and most commentators recognised that the theme of displacement remained insufficiently being addressed by the transitional justice research, see (I.C.T.J. , 2012)

commission (Duthie, 2012: p.34). Indeed, several world known truth commissions like in South Africa, Timor Leste, Liberia and Sierra Leone have integrated the IDPs' testimonials in their final reports (Megan, 2012: pp.201-222). Bridging the gap between displacement and transitional justice required recognition to synergies multiples actors of peacebuilding, development, security and transitional justice itself with the issues that affected the IDPs.

Yet as this thesis demonstrated, the empirical findings from the Kenyan cases revealed the complexity of attempts to bridge the gap in practice. Through the author's conversation with the IDPs²⁹, not all transitional justice concepts and institutions that will be chartered in the next Chapter 1 have successfully provides space to rehabilitate or to resettle the IDPs as stipulated by the transitional justice institutions' mandates in Kenya. Of course, this not to blame on the institutional limitation of the transitional justice alone in the country but to highlight the failure of the transitional justice actors in the country, as well as at the ICC level to recognise that their transitional justice institutions are conditioned by power relations. By recognising the brinkmanship games of the ruling class and what I have illustrated earlier as the logic of neo-patrimonialism, I would revealed how such logic hide under the peculiar cloak of legalism and transitional justice norms to implicate partial justice that have not met the actual needs of the IDPs which remained to be victimised.

Through the everyday lens of the IDPs and what I have explained earlier as their everyday resistance, the informal conversations that I had with the IDPs not only

²⁹ The author would like to personally express his sincere appreciations to the first group of self-help IDPs that engaged with the author in stimulating academic debate on the philosophical nature of human needs and vulnerability. Without these, the author remained blinds to see the gap between theory and practice in humanitarian missions and justice linkage processes.

revealed the shortcomings of legalistic language that emphasise the institutional building of transitional justice mechanisms in Kenya, but a power relations, and how these institutions become parts of the ideological apparatus of the local elite, as well the global template of post-conflict peacebuilding, invoked through the notion of sovereignty and national security to defy the already problems of the international justice or the ICC's legitimacy at the eyes of African countries and other developing countries. While critiqued argued that transitional justice institutions are not fully molded by the ruling class per se, and concerted as parts of the civil society's crusades in 'taming the leviathan', my immediate replied would be calling for a wake up call³⁰ among the debaters³¹ of Kenyan politics in order to distinguish between efforts to build standard settings of the legal framework (procedurals) and the integration of these legal exercise with the interplay with agency and how various agencies corresponds with these legal instruments (substantives), understanding this is a key to realise the blind spot³² in analysing African Politics and IR.

For that, this thesis has narrowed down its focus on one particular segment of human rights victims after the Kenya's 2008 crisis, namely the IDPs. This thesis identifies the victim's perspective as a subaltern agent, while the victim is characterised by Roger McGinty and Oliver Richmond (2013), Jim Scott (1986) and Susan Thomson (2011) as a critical agent of everyday resistance. As such, the selected victims' voices, perspectives and acts of resistance that emerge from the IDPs' narratives are

³⁰ Similar reactions have been hinted in the literature of sociology and land in Kenya, see (Kantai, 2007)

³¹ The author would like to express his deep appreciation for the enlightening debates that he had engaged with Assoc. Prof. Dr. Gabrielle Lynch (Warwick, UK) during his PhD's oral examination/viva on providing very insightful perspectives on a philosophy of intellectualism in Kenyan political scholarship.

³² For a useful discussion on a critical advice for blind spot in African political research, see (Taylor, 2004)

considered by what discussed earlier in the subsection of the everyday resistance as a ‘hidden transcript’, which revealed the difference IDP’s voices about peace, justice and reconciliation. Below, it will be shown how those self-help IDP community from the 2008 crisis and their languages of resistance can be read as one of the way to understand the dynamic of transitional justice institutions in Kenya.

ii) The Patterns of Displacement and Method in Accessing the IDPs

As mentioned earlier, the issue of displacement has existed prior of the 2008 crisis. All forms of displacements, whether caused by violence, ecological factors or projects, play into the grand narratives of deprivation and vulnerability, while at the same time exposing the reality of weak legal frameworks of governance, opaque and unequal mechanisms for accessing natural resources and poor human rights protection regimes (Juma, 2013: p.17).

The main and most devastating cause of internal displacement in Kenya is politically-motivated ethnic violence, which tends to recur during general elections held every five years. Since the reintroduction of multi-party politics in 1991, ethnically-heterogeneous regions of the Rift Valley, Nyanza, Western and Coast provinces have experienced violence in which some members of ‘indigenous’ tribes are pitted against migrants who are constructed as ‘outsiders.’ Claims that migrants acquired other communities’ lands unjustly through patronage networks undermine respect for their land and property rights. These claims have been used by politicians to mobilise ethnic militia to forcibly displace ‘outsiders’ and dispossess them of their land and property (Chapter 3). In 1992, 1997 and 2002, the displacement occurred before elections, but in 2007 it was triggered by a dispute over the results of the presidential

election. Hundreds of thousands of households have been displaced around these elections: 300,000 in 1992; 150,000 in 1997; 20,000 in 2002; and over 660,000 in the 2007 post-election violence (Kamungi, 2009: p.1). As such, displacement were described by some as the ‘permanent features’ of recent political violence in Kenya (Kamungi and Klopp, 2008: p.53). For that, the immediate concerns of resolving the 2008 crisis that subsequently led to the development of the transitional justice institutions are revolved around the primary attentions on resolving the IDP’s humanitarian needs and further robust framework of ‘durable solution’. As results of the 2008 crisis, there are several types of the IDP camps that can be identified based on the patterns of displacements that occurred during the crisis.

Firstly, those who lived at the camp and eventually success in being resettle either through government’s concerted efforts in compensation, closing the camps and restitution, especially through the allocated land plots, funds to buy new land or returning home to a place where the IDPs came from. As discussed earlier, not many IDPs received such opportunities and the estimated number of the IDPs fall within such category (as released by the government), are disputed by many international and local actors.

Secondly, those who initially have decided to remain at the camps in various part of the country. However, the major camps that scattered around Rift Valley province and the city of Nairobi have been the major targets of the government’s forced operations in closing these camps without a proper consultation and resettlement schemes. In regards to the government’s operation, Shutzer describes,

internally displaced persons (IDPs) were asking for two things – security and land – that the government of Kenya could not provide without addressing the contested issue

of land tenure that lay at the heart of the violence and displacement. Such a process would threaten the very foundations of wealth and power in Kenya, inherited directly from the colonial period's settler population. That the fighting displaced over half a million people who continued to garner attention from the media was scarcely lost on Nairobi's decision-makers, many of whom had much at stake in preserving the status quo. It was at this critical moment that the Kenyan government introduced Operation Rudi Nyumbani (Operation Return Home/ORN), a resettlement programme for Kenya's IDPs. Citing legitimate concern about the deleteriousness of long-term encampment, the government closed down camps and proclaimed to an international audience that all IDPs had returned home.

Such an amicable name, Operation Return Home, offered an ironic contrast to the government's forceful closure of IDP camps. When the operation began, there had been little effort to reduce hostility outside the camps, and many IDPs refused to leave, in part because they did not have a home to which to return safely. In order to remove IDPs from the camps, the government used physical force, cut off food and medical supplies, and made promises of compensation. In several cases, the police raided camps at night, burning down tents and chasing people away (2012: pp.345-346).

Those who were forced to move out can be divided into two major groups; the integrated camp and self-help. In the previous section, I have touched on the 7000 self-help IDPs who have decided to collectively settle down in limited tents instead of returning home while pressuring the government through various avenues to fulfill their resettlement needs (interview with IDP no. 17, Rift Valley, February 14, 2012). In addition, the second group was known as the integrated IDP camps. The integrated IDP community made up around 47% of the 2008 IDPs and the term used by the government to refer to those who have been integrated in the community and lived with their closed by relatives in urban and semi-urban areas. However, as mentioned by a local researcher,

it is not at all clear that 'integrated IDPs' in Kenya no longer have needs related to their displacement. In fact, because they are much less visible than IDPs living in camps, it is difficult to get a clear picture of what those needs are. Moreover, those who are 'integrated' joined the old caseload of IDPs, including those who had not found a durable solution since their displacement in the 1990s.

The multiple causes of displacement suggest that the number of IDPs in Kenya remains significant, yet solutions are elusive for many. Following the formal closure of camps in 2010 and widespread public perception that persons still claiming to be displaced are imposters or 'fake IDPs,' there are only a few officially-recognised IDP settlements. The majority of Kenya's IDPs live outside of camps.

While the role of municipalities in managing internal displacement is peripheral due to government practice, it is municipalities that bear the brunt of the negative impacts of influxes of IDPs. It is also important to consider that the new constitution of Kenya has created a devolved government structure that envisages municipal authorities playing a more central role in the management of affairs at the local level (Kamungi, 2013: p.2).

The author largely agreed with Kamungi, and as such the term ‘IDP’ throughout this thesis referred to those who is still living at the self-help camp, or being considered in the integrated camp. The term ‘integrated’ here refers to those who have involuntarily moved to the slums or other urban or semi-urban populated residencies. While major camps are close, government through the local country or district office has not provided a clear plan for a durable solution (interview with ICTJ officer no. 1, Nairobi, February 26, 2012).

For that, throughout the IDPs interactions that they have with those officers that represents the government, the local NGOs and representatives of the international actors, especially the ICC, allows this thesis to construct a social pattern of their everyday resistance. In this regards, their everyday perspectives of subaltern agents were gauged by an open-ended questionnaire, which allowed respondents to characterise transitional justice in their own words. The victims’ or subaltern agents’ narratives were provided by those IDPs and former individuals who lived in IDP camps; their narratives of justice and peace indicated a different perspective from that of state agents and international actors.

The approach of eliciting these subaltern narratives regarding the popular understanding of justice and reconciliation is based on Jacob Rasmussen’s study of the narratives of ordinary Mungiki individuals, which has been suppressed by Mungiki leaders and state agents (see Rasmussen, 2010). Cited in Feldman’s research in

Northern Ireland (1991), Rasmussen's definition of a narrative as being a means with which the narrator (the critical agent) can construct his or her story when he or she has already been subjected to and suppressed by the powerful inscription (the narratives of the international actor and the Kenyan government). As is eloquently summarised by James Baldwin:

[I]f one really wishes to know how justice is administered in a country, one does not question the policemen, the lawyers, the judges, or the protected members of the middle class. One goes to the unprotected - those, precisely, who need the law's protection most! - and listen to their testimony (1985: p.42).

In this thesis, the narrative of everyday resistance is constructed as a 'way of freeing oneself from such [the ICC's, the TJRC's and Kenyan politicians'] inscriptions' (Rasmussen, 2010: p.443). The narrative of everyday resistance is central to this thesis's argument on highlighting the limitations of transitional justice in administering justice to the victim and advancing political accountability. This is because the narrative is directly connected to Foucault's notion of power and Althusser's notion of ideology, according to which the narrative of everyday justice and resistance challenges the authenticity of KNDR policy. This policy provides the same reconciliation narrative for every Kenyan, and provides a framework for unraveling the political motives of the ruling class in supporting such a policy (Chapter 3).

The conceptions of everyday justice and reconciliation held by the victims who reside in IDP camps can be understood by first identifying the reasons for the IDPs' resistance, and for their claims that the ICC and TJRC's proceedings no longer represent them (fieldwork note no. 2, Rift Valley, March 25, 2012). With regard to the IDPs' narratives, all individuals who participated in this research were well aware of the risk that the ICC's proceedings and ruling class would create repercussions on

them. Additionally, all interviewees had an up-to-date knowledge of the ICC's proceedings as they were reported in local mainstream newspapers (fieldwork note no. 1, Rift Valley, February 29, 2012).

VI) Research Ethics and Limitations: Dealing with Highly Sensitive Political Environments and Subjects

In this section, I share the dilemmas that arose during fieldwork, dilemmas that emerged perhaps because the author is working in an environment new to myself, namely the IDP camps, as well new, to a semi-structured interview method in highly sensitive environments. Although the author had traveled to the country prior conducting his extensive fieldwork in 2012, he too was new to the study site, with prior knowledge based only on having learned about it through his reading in secondary literature and the media and acquaintances from the area. Prior embarking into his extensive fieldworks, the author had also lived and completed his postgraduate research training both in England and Scotland for 3 years, thus situated in various different cultures as home. Within the literature of qualitative research methodology, a non-western researcher based in Canada, describes this as being in a bind, 'where one is a third-world researcher who lives and works in the first world (over here), yet whose field of research is a third world site (over there)' (Khan, 2005: p.218). The non-western researcher mentioned here highlighted how she has been perceived as an outsider despite her ancestral linkages to Pakistan.

Within such backdrops that this research was planned and carried out, and share my experiences not only under the mandate of reflexivity that comes with qualitative research, but also for other researchers aiming to work in new contexts. Other researchers have also written about their ethical and methodological challenges whilst

either working in the Global South or with marginalised communities. For example, Riessman (2005: p.478.) reported how her research participants (barren women) in South India resisted signing the informed consent form as they were suspicious, associating ‘signing’ with a formal government document (p.478). Three concerns inmate my next discussion on research ethics and limitations, and each will discuss in turn.

i) Preparing for the Fieldworks at the IDP Camps

Research in new contexts can be daunting, and in preparation I explored, as far as was possible, background literature about the peoples, history and politics of Kenya, as well as engaged in dialogue on the methods and ethical guidelines to be used. By 2011, during my first year PhD review,³³ I have been wisely advice by the Convener for research students at my School to seek an advice from my Principal Supervisor, Prof. Ian Taylor in regards to research ethics and risk assessment prior conducting my fieldwork. For that, as part of the requirements to upgrade my status from a general research student to a full-time PhD researcher, I agreed with my supervisor advices to audit and to attend the additional modules³⁴ offered by the School of International Relations, as well the MPhil core modules³⁵ in Social Sciences that conducted by the University of St Andrews as a pre-requirement for conducting my fieldwork in Kenya. On April 25, 2011, I received a writing notice from the Postgraduate Committee, the School of International Relations University of St Andrews to inform that I have been fully upgraded as a PhD researcher. Without the advice of my

³³ See the sixth document enclosed at the front page of this thesis.

³⁴ The modules: IR3024 The Politics of Africa; IR3033 Post-Conflict Transition in Sub-Saharan Africa; IR4516: The International Relations of Sub-Saharan Africa; IR5702: Case Studies in Conflict and Fieldwork, and IR5723: Conflicts and Security in Africa.

³⁵ SS5102: Philosophy and Methodology of the Social Sciences.

supervisors and flexibility of the University in offering these modules, I may not equip myself with the fundamental knowledge in research and writing.

During my first year doctoral training, I have been informed by the Conveners of *IR5601 Research in International Relations* and *SS5103 Qualitative Methods in Social Research* on a prerequisite of any doctoral researcher that intend to conduct a fieldwork must apply and receive a writing consent from both School of International Relations (where the author registered as a PhD student), and the University on the matter of ethics in research and risk assessment. As stipulated by the School of International Relations Handbook for PhD students and the University Regulations for research students, any doctoral candidate that intend to conduct a fieldwork must submit two different applications to the School's Research Ethics Committee, and this application will be submit by the School to the University Teaching and Research Ethic Committee (UTREC) for their considerations and approval before the student final submission of his/her thesis for the purpose of the oral examination/viva.

Returning from my second trip of fieldworks and after gathered all the necessary information, I submit my Research Ethical Form³⁶ for all the periods of fieldworks that I conducted, and the UTREC received and considered my application form from the School. On September 13, 2013, I received a three years period of approval for all my fieldworks within my doctorate years (Reference Number: IR11188), which insisted that I must follows all the guidelines in regards to conducting fieldwork that deal with a living human being³⁷, as stipulated in UTREC's guidelines.

³⁶ See the third document enclosed at the front page of this thesis.

³⁷ While this regulation mainly governed the research conducts in the field of medicine and health sciences, UTREC's applied these regulations to all research that deal with a living human being, including those who occupied the conflict zone.

In addition, I have submitted my Fieldwork Risk Assessment Form with wide consultations from my supervisors, and the Head of the School in regards of evaluating the potential hazards that may hinder my research and life. Having satisfied with all the foreseeable significant hazards associated with the fieldwork have been identified and adequately controlled, I received the writing consent for all my fieldworks on May 27, 2014.³⁸ In short, I consulted the relevant bodies regarding ethical framework, drafting my ethical guidelines from it and editing it through input and critique from colleagues, and lessons learned from prior research engagements. Additionally, I received valuable advices from attending various workshops on conducting fieldwork and writing from various relevant institutions, including the University of St Andrews' Library, the University of Oxford's Bodleian Library, the Royal African Society, the British Association for International Studies Association, the International Political Science Association that all based in UK and the British Institute for Eastern Africa based in Kenya.

ii) What Happened at the Fieldwork Site?

Despite careful preparation, I experienced a range of dilemmas that I will discuss below. (Cloke et al., 2000: p.133) report similar experiences with their research among homeless people in England and state that this may be because theoretical information and preparation, sometimes becomes less clear and noticeably more personalised when imposed in a different context, removed from the one for which the ethical and methodological procedures were originally designed. Indeed, there has

³⁸

See the fourth document enclosed at the front page of this thesis.

been polarised debate³⁹ on which ethics and research practice should prevail. There are those supporting a universal code of research practice (deontological) and those who believe it should be contextual (consequential).

In short, in this thesis, I have decided to take a pragmatic approach that spurns the rigidity of doctrinal rules in favour of adjusting research practices according to different contexts and the likely consequences of research therein. For that, while my research may be driven by a personal drive for social justice, a philosophical position concerned with empowerment, and facilitating agency, not only in individuals, but in the whole of society, I posit that the consequences of the research should be for the good of the participants and the people around them and having moral sensitivity and good intentions with a moral imagination to protect the IDPs that respond to my questions from any calculated political repercussions, and not to passing any biased theoretical judgment that may not reflect their social realities in my writings.

For instance, Lucy (not a real name), one of the senior female IDP's accounts of resistance was recorded through a series of six semi-structured interviews conducted as part of an extended set of discussions held every 2 weeks between March and April 2012 (interview with IDP no. 19, Rift Valley, February 16, 2012). In the course of these interviews, each spanning approximately 4 hours, she provided an oral account of her vivid⁴⁰ experiences between December 2007 and March 2008. The exchange was recorded and later transcribed in its original Kiswahili and translated into English

³⁹ For a detailed debate on the universal versus local particularity in research ethics, see (Yan and Jament, 2008)

⁴⁰ Including her detailed descriptions of physical and sexual violence committed by the local thugs at the instruction of the local MPs. However, she later agreed to remove that part of the explicit details from my official personal records in order to safeguard her dignity as a victim of gendered based violence and human rights. My thesis largely inspired by her moral strengths and stories on how does an ordinary individual human being survive in the middle of conflict zone.

by my assistant, a retired professor of Kiswahili at private local university in Kenya. At the next meeting, the Kiswahili version was read back to her, normally by a close family member, for confirmation and amendment. These changes were then added to both the Kiswahili and the English versions that were checked by a second translator.

Given the deeply personal nature of her narratives, I arranged to bring back the full typed transcript to Lucy, so that she could keep a written record of our discussions. It was two weeks until our next meeting and I arrived with the diligently typed opening chapter to her narratives. The goal was to check for any alterations and corrections that she wanted to make and to leave a copy for she and her family. Lucy's elder daughter and two of her children were all at the camp to greet myself. She instructed her daughter to read the typed pages to her. The process was detailed and dynamic, with Lucy adding comments and amendments, as the reading continued. All her family members remained throughout the exchange, listening to her telling of a complex personal history. At the conclusion of the discussion, I explained that the typed pages were for the family to keep as a record. I had additional copies to which I would make the changes and would bring them back at the next interview. Lucy refused. Leaving papers behind after my visit would start rumours, she explained; therefore, I must leave with the papers in the noticeable brown envelope, just as I had arrived (interview with IDP no. 19, Rift Valley, February 16, 2012). This is one of the few examples on how I practiced my ethical consciousness during the fieldwork. To respect the IDP's confidentiality and to ensure the safety of the Kenyan assistants, interviewees and translators from any possible political repercussions created by this thesis, the interviewees referred to throughout this research have been given pseudonyms.

Nevertheless, in the discussion of the actual method of interviewing the IDPs here, I largely agreed with Griffiths' advice (1998), methodology provides a rationale for the way in which a researcher goes about getting knowledge; it is therefore more than a description of techniques or tools, as it provides reason for using such techniques in relation to the kind of knowledge that is being collected, developed or constructed.

My interview with the IDPs was undertaken in various self-help camps, or slums that occupied by previous members of the IDPs that were subjected to involuntary resettlement scheme of the Operation *Rudi Nyumbani* in May 2008. Though multicultural⁴¹, its predominantly "home" to the Kikuyu community. During the fieldwork, observation and informal conversations with the IDPs were very helpful in understanding both the physical and social environment of the camps and slums. One of the distinct features of those that lived at the self-help camps and slums is that basic infrastructures were incomplete and dilapidated, where some tents are occupied with more family members than it can provide. This lack of privacy meant people have to go to toilet in gendered based groups (except the underage children) in order to be able to watch out for each other. Due to lack of privacy, some of the IDPs having a discussion with the author in various groups, and some held a returned meet for further interviews at three different venues that the author were stationed⁴² during the fieldworks. Throughout multiple meetings with some of the IDPs or former IDPs that now occupied the slums, the author discovered that the IDPs expressed in more comfortable free discussions without any hesitation or interruption in discreet

⁴¹ Other minority ethnic communities like Kalenjin, Luo or Kenyan Somalis are mostly female members and are related to the Kikuyu's IDPs through wedding prior the 2008 crisis, or a 'pretended' marriage that was intended to protect their safety during the outbreak of the violence from any harms.

⁴² See on the fieldwork's period section of this chapter in order to gain more details on the locations.

locations where the author based. In this regards some researchers would describe this as researchers taking the opportunity to use their ‘distinctive powers’ on behalf of ‘disadvantaged groups’, an example of going beyond the principle of doing no harm, to one of doing good (Harding and Norberg, 2005). In other words, it was an instance of taking Werhane and Moriarty’s advice (2009), to ‘disengage from one’s primary framework or extend or adapt that framework in a meaningful way’.

For that, in regards to the selection of participants, the IDPs involved in this study comprised of both male and female adults, all over 21 years of age. Those interviewed in this line of research mostly traveled daily from Rift Valley to Nairobi, and were engaged in informal discussions with the author on the themes of reconciliation, national unity, peace and justice. The interviewees consisted of victims of post-election violence, including 30 Kikuyus, 30 Luos, 30 Kalenjins and 10 individuals from other ethnic communities. The interviewees were of varying professions.⁴³ The author conducted a series of semi-structured interviews with 103 residents of IDP camps, some of whom still reside there, or have moved to the slums. The interviews were conducted over a thirteen-month period that was split over 2009, 2012 and 2013.

However, their narratives have had to be taken with a pinch of salt, especially in relation to exaggerated, self-aggrandising and misleading statements. As such, the interpretive process of recording, translating and analysing IDPs’ narratives was a painstaking, delicate and imperfect process.⁴⁴ It aimed to tackle some of issues of

⁴³ Most of the residents of the IDP camps identified here are known through their networks with local NGOs. The author would like to express his deep gratitude to the Kenyan citizens who co-operated with him throughout his research and who made the writing of this thesis possible.

⁴⁴ I have decided to remove the original name of the IDPs and anonymous them by using numeric records, for both my personal records and citations throughout this thesis. By doing so, I have

translating personal accounts across cultures and draws on the current approaches adopted by Krog, Mpolweni and Kopano (2009: pp.175-207) to understand transcripts of atrocity provided before the South African Truth and Reconciliation Commission (TRC). These authors argue for the need to read and interpret written transcripts inside an understanding of the immediate social context from which the individual was speaking. As a result, they suggest that the process of translation, in and of itself, may aid the researcher in accessing a participant's world-view as well as a given account of events. In line with this thinking, the recording of IDP's testimony at their "home" was the first act of interpretation, followed by the process of transcription, translation and analysis. Additional research was undertaken in the form of contextualising the data from the interview transcripts by a triangulation process tracing the gathered information back to its original source in order to verify it.

As such, the most accurate written reflection of IDPs' narratives would be to include the full or partial transcript throughout this thesis. However, as established, even in the writing of it, interpretation is occurring and so this piece deploys a more overt heuristic device that of focusing on critical junctures to capture the IDPs' sets of choices over time. In short, the focus on the residents of the IDP camps does not mean that they are deemed to represent the interests and identity of the wider public, but simply that they provide a sound articulation of the role of the critical agent within the various segments of Kenyan society. This helps to substantiate the claim that the official language of justice and reconciliation used by the international and national elites in relation to the ICC's suspects is not recognised or understood by the ordinary populace.

done in the best of my individual capacity as a researcher in case their recorded narratives subjected any future mitigations.

iii) Reflections on the Limitation of Qualitative Research

Some of the key limitations encountered discovered in this research will be discussed below. Like many qualitative, interview-based research, there were two major obstacles confronting the carrying out of the fieldwork: building trust with the respondents and framing an impartial perspective. While the country has enjoyed relative peace since February 2008, the IDPs who imparted their opinions to the author exhibited a heightened sense of vulnerability and distrust towards the state, especially when engaged in highly sensitive and political topics of conversation. This reluctance to give an opinion can be explained by the fact that the ICC and TJRC's proceedings were still ongoing (at the time of the research), and that those questioned on these processes were subject to multiple political penalties for their opinions.

Additionally, the attempts to build the trust with the IDPs revealed the 'positionality and power'. The asymmetrical relations between my position as a researcher and the IDPs constitutes certain normative barriers and presumptions among the IDPs which resulting an initial awkward interaction where those that I interviewed were curious and suspicious, especially with many previous researchers before the author asked the relatively similar questions (interview with IDP no. 2, Rift Valley, February 10, 2009). Thus, our conversations were initially staturated with conflicting expectations, including asking for financial helps to buy food and other basic needs. In this situation, I break the ice or the awkwardness by sharing some of the hardship livelihoods that I have suffered while grew up in a poor economic background family with previous living experienced in slum in southern Malaysia during my high school

years, creating a shared temporal moment for the IDPs to ask more and eventually willing to freely discuss their thoughts on my questions.

However, the most difficult challenge in engaging with the IDPs is a feeling of fear among the IDPs from being seen by other IDPs, or an outsider Kenyans including the local authority when conversed with the author (interview with IDP no. 4, Rift Valley, February 4, 2009). This was mostly resolved through meeting at my place rather than me having a frequent visit to the camps or slums. In this instance, power relations manifestly evidently in the stark differences of wealth and social relations between the author and the IDPs that conversed, requiring an act of empathy by sharing some of my foods or water bottles with those that agreed to have a separate individual meeting with the author for future discussion. This is one of the examples that were likely to have been uncomfortable and not necessarily anticipated, with the author unable to prepare for every eventuality.

Through a moral imagination process, the authors deliberated on this issue in hindsight, deciding that on future occasions I would either leave my water bottles in the car, or take enough water to share with my participants. I did take some groceries to the schools, such as loaves of fresh bread and other foods like fruits which were very hard to come by in these hostiles camps/slums. This was also a cultural gesture since it is appreciated when a visitor brings 'milk and bread' (interview with IDP no. 5, Rift Valley, February 21, 2009). However, the gifts of 'hard to come by foods' may also have aggravated the power imbalance. Such instances go beyond a formal ethical framework designed in, and for, northern contexts.

In order to minimise disparities of power, I did my best to behave in a way that was as culturally aware as possible. For example, I dressed very simply, in a similar style to that of the IDPs. I also adopted a friendly disposition and conversed in Kiswahili, only speaking in English if the other person appeared comfortable with that. By acquiring basic Kiswahili and relying on a reputable local translator to engage with various Kenyans (since the author is not a Kenyan nor spoke Kiswahili prior to undertaking the research) it was possible to reduce the occurrence of cultural and contextual misunderstandings. Though using the local language helped develop trust and to be seen as ‘one of them’ (Griffiths, 1998: 40) we were still seen as having ‘superior’ knowledge (Lynch, 1999). Lynch describes this as an ironical situation, in that, despite my efforts to fit in I still presented ‘dominance’ (p.45). Perhaps an ethnographic style of research method in the community would have helped better in overcoming power dynamics, but time⁴⁵ and resource constraints did not allow this.

Secondly, one of the major obstacles to conducting the research, the local authorities (whose presence only moderately affected the in-depth interviews, as on most occasions the author was able to explain and “escape” from local bureaucracies) rarely hindered its progress. Meanwhile, officials and those involved in collecting the testimonies of human rights violations through TJRC hearings refused to let the author see the primary sources of the collected testimonies. In response to this challenging fieldwork environment, the author conducted additional interviews with some of the IDPs and borrowed their everyday notes⁴⁶ as data with which to construct a view of the rehabilitation and reconciliation processes.

⁴⁵ The author was funded for his PhD research, and his bursary sponsorship requires him to finish his fieldwork and thesis writing within 36 months.

⁴⁶ Success in establishing a good relationship with 50 IDPs allowed the author to provide them with mini notepads that allow them to write down their daily activities at the camps/slums when they

In addition to the above challenge, I faced my biggest dilemma with issues surrounding confidentiality. During the interviews, I learned of situations that were obviously harmful, especially the explicit details of sexual and other types of physical violence committed at the camps/slums or previous encounters of such crimes but have escaped from the local authority or the police (interview with IDP no. 11, Rift Valley, February 8, 2012). After hearing this, I were faced with an ethical dilemma because though I had promised the IDPs not to discuss their data with anyone, I felt that their safety was at risk and eventually spoke to some researchers and local NGOs without mentioning the IDPs' names (interview with HRW officer no. 1, Nairobi, February 27, 2012). Most of the local NGOs' officers or activists had grown up in the area and were very much aware of the violations or crimes that have occurred during the 2008 crisis. They said that constant dialogue with community members would be needed in order for the IDPs from various communities to speak with each other and their stories will be compiled by the local NGOs for various civil attempts to seek criminal justice at the local and national courts.

A lesson learned during this fieldwork on the issue of consent and permission. Prior embarking the fieldwork, I have been officially informed that I only need a social visa to enter the country for every two months, and no further permit applications is required for conducting fieldworks. However, the local authority that engaged with the author at the camps/slums do sometimes being hesitant and questioned the author position to be at the camps/slums. In this regards, soft and informal norms took it

not meeting the author. Of course, they were voluntarily agreed to do so and have managed to hide these mini notepads away from being access by any individuals that they perceived as a 'threat' to their writings. Upon receiving their verbal consents, the author kept these anonymous notepads for getting an insider perspective of those individual livelihoods at the camps/slums.

place and followed a chain of command. To protect the safety of those involved, the authors both canceled his visits on that day and asked for more assurance from the IDPs involved, and eventually they are more willing to travel to the author's location for in-depth discussions (interview with IDP no. 18, Rift Valley, February 15, 2012).

As such, I negotiated a process of informed consent with my research participants, informed consent in this IDP community was different from what might normally be regarded as consent in western contexts, in that it followed a chain of command. For example, after getting permission from the various and relevant ministerial departments in charged on the IDP and District Officer, I met the slum/camp leaders and local NGOs and it was through them that I came to meet the IDPs. This chain of negotiating entry varies across contexts and shows that gaining permission is not always a one off event. This bears methodological implications to researchers wanting to work in the Global South, although collaborating with local NGOs, as I did, helps to bridge these different methodological circumstances as they are obviously more aware of local protocol.

In nutshell, all of the IDPs were very responsive and pleased that I had chosen to work with their camps/slums (interview with IDP no. 6, Rift Valley, February 26, 2009). I appreciated this warm welcome (interview with IDP no. 9, Rift Valley, February 25, 2009). I have had experiences where even if IDPs have been open to a study, they have asked critical questions about my intentions and how they will benefit from the study (interview with IDP no. 12, Rift Valley, February 9, 2012). Here it was different, and at times I wondered whether their unquestioning acceptance was partly because of the power issue or perhaps a culture that obeyed authority

without question. However, by continuing to engage in multiple social interactions with similar respondents over certain periods, it was possible to establish a reliable relationship with each interviewee and to provide a “comfort zone” in which the IDPs could speak freely about complicated issues surrounding the ICC and the TJRC, (building trust and network with the IDPs).

Nevertheless, it is almost impossible to generate a comprehensive description of justice and reconciliation in Kenya due to the limited number of participants, geographical confusions, and the fact that the ICC’s proceedings were still ongoing. Situating the IDPs’ understanding of justice and reconciliation within a complex array of legal jargon also proved difficult. In the author’s interactions with the respondents, the key questions surrounding justice and reconciliation proved to be too large to be comprehensively summarised by one single research project.

One such example is the question of who should be held accountable for political massacres connected to various middle- and top-profile officers of governments that existed prior to the 2008 crisis (T.J.R.C., 2013: Vol. I, pp.62-78). Due to the limited degree of connection that most Kenyans feel with the transitional justice proceedings as debated by politicians, it proved necessary for the author to engage in more unstructured and informal modes of interaction with members of public, not all of whom lived at the camps. Some of these had been eyewitnesses to the TJRC’s proceedings, as well as to the state’s legacy of violence, impunity and injustice (fieldwork note no. 2, Rift Valley, March 25, 2012). This provided a deeper understanding of the perspective of ordinary Kenyans, in particular from the camps/slums in relation to the previous government’s attempt to address collective

wrongdoings with transitional justice mechanisms. These perspectives are embedded in a rich and broad field of state-society relations, and inherent social patterns. This approach constitutes a significant development in compiling a comprehensive account of what recently happened in Kenya since 2008. Through the above extended discussion on research methodology, let us now embark to the next chapter, on the key literature reviews, key concepts and conceptual framework utilised for this thesis.

Chapter 2: Liberal Peacebuilding, Transitional Justice and Power Sharing: Power and Ideology in Kenyan National Dialogue and Reconciliation (KNDR) – Justice without Punishment?

‘Men are unable to forgive what they cannot punish and unable to punish what turns out to be unforgivable’ (Arendt, 1999: p.241).

A – Introduction

This chapter is divided into three parts. The first part examines the key debates surrounding liberal peacebuilding, transitional justice and power sharing literatures in order to highlight the critical approach undertaken by this thesis toward peacebuilding and transitional justice. This examination also serves to illuminate the deeper affinity between liberal peacebuilding and transitional justice. In the liberal cosmopolitan approach to post-Cold War International Relations (IR), these entities can be viewed as two sides of the same coin: peacebuilding as a political project concerned with rebuilding the state and establishing a state of sustainable peace, and transitional justice as a legal project that concerns itself with evaluating the modes of prosecution and other non-legal measures during the transitional phase. Hence, this first part maps the increasing international trend of implementing transitional justice through local power-sharing arrangements, and identifies this development as an entry point for explaining and understanding the local political milieu in which the attempts to deal with post-election violence transformed into transitional justice policy.

Having clarified the key terms and concepts used throughout this thesis, the second part of this chapter asserts that the development of the local peace process of the Kenyan National Dialogue and Reconciliation (KNDR) agreement is a product of the

integration of the transitional justice agenda into the power-sharing agreement. It also demonstrates how this peace process developed from local discourses concerning the removal of impunity through the idea of accountability. Hence, the discussion on removing impunity and developing political accountability through transitional justice appears to have been the predominant form of discourse being projected in the aftermath of post-election violence. The discussion turns to an examination of transitional justice mechanism in applying political, as well as criminal, accountability; and how the ruling class has obstructed this application.

The argument is based on two main assumptions. The first is that a discourse on political reconciliation based on KNDR constitutes transitional justice as a form of accountability. This connects the specific transitional justice mechanism with the element of accountability, and its two main components: answerability and enforcement. In conjunction with these components, the specific transitional justice mechanism in Kenya can be theoretically connected to the idea of holding the Kenyan leaders accountable, and therefore subject to criminal sanctions. The second assumption is that, while a discourse on political reconciliation that arose from KNDR placed an emphasis on a higher level of accountability, the process of building a specific transitional justice mechanism was impeded by political impunity.

On the final part, this chapter also presents a conceptual framework for how power and ideology can be used to plausibly map the transitional justice processes in Kenya. The aim of this chapter is to contextualise the relationship between transitional justice

and accountability, and to situate this relationship within Kenya's ruling class⁴⁷ and its notions of power⁴⁸ and ideology⁴⁹. Drawing from Michael Foucault's works on power (1977; 1980b; 1980a; 1984; 1997b; 1997a; 1998; 2002a; 2002b) and Luis Althusser's writings on ideology (1971; 1976; 1977; 2001), the discussion in the final part of this chapter unfolds into three subsections.

Firstly, by exploring the Foucauldian conception of power, the study defines transitional justice as being one of the dominant discourses of accountability that arose from the post-election violence; the political agent is able to evaluate himself and others based on this discourse of accountability. Secondly, the study shows how the political agent resists the dominant discourses of accountability by projecting alternative discourses. This action is known as political impunity. Hence, transitional justice processes embody what Foucault terms as knowledge (*connaissance*) of the ruling class' resistance to justice, rather than knowledge (*savoir*) of accountability.⁵⁰ Thirdly, the study uses Althusser's works on ideology to unmask the ideological apparatus of reconciliation in Kenya, in which TJ was implemented for the purposes of defending the entrenched culture of impunity, but not for addressing the demands for accountability. As such, this chapter provides a conceptual framework for

⁴⁷ By the 'ruling class', the author means the GNU senior officials, the political elite, MPs, state bureaucrats, transnational actors (including AU and UN officials), the security forces (including non-state militias hired by the state) and those directly involved or connected to the process of formulating KNDR as a blueprint for the political reconciliation project in Kenya, as well as those who decide on which transitional justice measure will be implemented. Kofi Annan's personal narrative of leading the negotiation surrounding power-sharing and transitional justice helps the study to identify the major members of the political elite who were involved in the process. See Anna, 2008; Kanyinga, 2011.

⁴⁸ This notion of 'power' here should be seen as the process or constellation of power that surrounds the agent, rather than a 'thing' or property that is wielded by him or her. See Foucault, 2002b.

⁴⁹ The notion of 'ideology' here is defined as the process of constructing the imaginary projection of our reality and, how it perceives and identifies real conditions. See Althusser, 2001; Žizek, 1994.

⁵⁰ The English word 'knowledge' has two distinct equivalents in French. Since Foucault wrote his original work of *Discipline and Punish* in French, we have to recognise this shortcoming in the English translation of his writings. See Foucault, 1997: p.ix.

identifying the “bigger picture” that connects the operation of two major transitional justice mechanisms in Kenya: the ICC and the TJRC.

B – Revisiting the Literatures: Liberal Peacebuilding, Transitional Justice and Power Sharing

D) Liberal Peacebuilding and Its Discontents

The end of the Cold War marked an increased focus on intra-state conflicts. As a result, there was an increase in the international determination to resolve these conflicts through peacebuilding missions, rather than by adopting policies that might lead to territorial distribution (Paris, 2004: p.24). The demise of superpower conflicts contributed to a proliferation of international peacebuilding projects (Bellamy and Williams, 2009; Jeong, 1999; Ramsbotham, 2000). Although the concept itself was not novel, it received considerable attention from international policymakers and commentators (Höglund, 2011: p.224; Kriesberg, 2011: p.77) with the 1992 publication of the UN’s *Agenda for Peace*, in which peacebuilding was defined as ‘action to identify and support structures which will tend to strengthen and solidify peace in order not to relapse into conflict’ (Ghali, 1992). The concept was later enriched by various UN documents (see Table 2.1), which signified its importance in navigating international peace operations in various conflict zones scattered over four continents.

Table 2.1: The Major International Documents on Peacebuilding and Transitional Justice

Organisations	Year of Publication	Title of the Reports
UN	1992	<i>Agenda for Peace</i>
UN	1995	<i>Supplement to an Agenda for Peace</i>

UN	2000	<i>Brahimi Report</i>
UN	2004	<i>The Rule of Law and Transitional Justice in Conflict and Post-Conflict Society</i>
UN	2005	<i>In Large Freedom</i>
UN	2006	<i>Uniting Our Strengths: Enhancing United Nations Supports for the Rules of Law</i>
UN	2010	<i>Review of UN Peacebuilding Architecture</i>
World Bank	2011	<i>World Development Report</i>
UNDP	2011	<i>Governance for Peace: Securing the Social Contract</i>

Source: Compiled by the author from various UN websites

Accordingly, what is termed as ‘liberal peacebuilding’ in Roland Paris’s (2004: p.9) analysis of the features of democratisation and marketisation that have been evident in peace operations since the 1990s is a call for international society to recognise the liberal agenda in various peace operations including (but not limited to) peacekeeping, the rules of law, human rights, humanitarian intervention, immediate election, open market economy, constitutional writing, power sharing and transitional justice.

Yet, as the peace missions became entangled with more complex questions of politics and national security, they came under a sustained barrage of criticism from peacebuilding literature about the heavy involvement of external actors, the recurring cycles of violent conflicts and the overreaching goals of peacebuilding missions (Franke and Warnecke, 2009: p.430; Menkhaus, 2009: p.230).

Perhaps, the works of Oliver Richmond shed some light on the various types of peace that have existed and been connected to the various aforementioned peace documents (2005: p.203). The overlooked analysis of liberal peacebuilding, and the convenient tendency of IR scholarship to analyse state-building and its dependency on violence

throughout European history, have overshadowed the crucial term of 'peace' itself (p.204). Consequently, according to Richmond, the 'mainstream IR theorists' defined peace as being opposite to war, and focused solely on state formation and institutional arrangements to secure legitimacy, thus discrediting the role of various agents that operated under the radar of the state at the local level (p.205). Hence, the aforementioned peace operations can be connected to the four strands of liberal peace: victor's peace (as witnessed during the two World Wars), constitutional peace (as witnessed in international tribunals, transitional justice and human rights projects), institutional peace (as witnessed through R2P, UNSC, regional arrangements and power-sharing peace agreements) and civil peace (appearing at the national and sub-national level of conflict zones, affecting civilian society and the ordinary population) (p.214).

While the operations may vary according to the specific needs of the conflict zone, they are underpinned by a liberal peace understanding of managing conflict, and so reflect a constituent part of the process of constructing a 'liberal post-Westphalian' order in predominant conflict zones in non-Western societies (Newman, 2001; p.425). Though it is almost impossible to establish Westphalian order in a fortnight, and such a one-size-fits-all approach violates the classical tradition of non-interference with other sovereigns' domestic affairs (through responsibility to protect), the approach is considered by liberal peace proponents to be the best course of action. This is most easily explained by the fact that their epistemological assumptions about liberal peace are derived from the larger tradition of democratic peace theory in IR literature (Cohen, 1994; Doyle, 1983; Gaddis, 1993; Layne, 1994; MacMillan, 1995; Mansfield and Snyder, 1995; Maoz and Russett, 1993; Owen, 1994; Richmond, 2008; Risse -

Kappen, 1995).

What remains problematic is the sustained level of criticism from proponents of critical peace scholarship (CPS)⁵¹,[□] who assert that the understanding of peacebuilding must be distinguished from the predominant understanding of liberal peacebuilding, and institutional approaches that tended to focus on state-building. Indeed, in his thesis on post-conflict peacebuilding in Sierra Leone, Patrick Tom confirms that the focus that has been placed on state-building in various peacebuilding projects in Africa since the events of 9/11 has redefined concerns about security and peace operations. This is particularly apparent in countries that are internationally and quantitatively ranked as weak states, and in stateless societies that are prone to terrorist activity, as witnessed in Afghanistan, Iraq and the Horn of Africa (2011: p.87). The CPS emphasize that the practice of peacebuilding encompasses more than simply the task of fixing the state (state-building), and involves a range of issues, such as ‘social justice, welfare provision, tradition, custom, culture, the grassroots, reconciliation, equity and humanistic agendas for peace rather technocratic institutional state-centric agendas for peace’ (p.94). As such, peacebuilding (including liberal peacebuilding) should be understood as a form of ‘vision of rights, development, and representation across societies, whereas statebuilding is the vehicle through which the neoliberal institutional and political framework in a particular version of this vision can be assured’ (Richmond, 2013: p.299).

To propose that it is necessary to distinguish between state-building and peacebuilding is not to make the radical proposal that peacebuilding can be developed

⁵¹ For a lengthy discussion on the development of CPS, see Richmond, 2010.

without a state; rather, it is to highlight that besides the fact that peacebuilding concerns itself with the task of rebuilding a state based on a 'Western historical model...', realist theoretical approaches (e.g. Morgenthau, Waltz, etc.), to sociology (Weber, Tilly), anthropology (Evans-Pritchard, Radcliffe Brown), history, and economics (Keynes, Marx, Friedman)' (p.300), there is also an argument to be made that it is dependent on various agencies that appear at the national and sub-national levels, and which are endogenous to the peacebuilding processes itself. This type of peace seemingly functions at the surface level of the post-colonial state and is manifested by the ruling elite's rhetorical commitment to peace, which does not actually benefit those who were subjected to violence (see Taylor, 2007). This brings the next discussion to the placement of liberal peacebuilding problems in Africa.

II) Liberal Peacebuilding and Its Critics in Africa

In African context, Devon Curtis was correct to assume that the recurring cycle of violent conflict in eastern DRC (2008) and similar features of protracted conflicts in Rwanda (1994) are visible in the recent crisis of South Sudan (2012), since the question of how to establish peace after violent conflict continues to preoccupy international policymakers, and there is continual disagreement as to what types of peacebuilding activities should be prioritised (2012: p.73; 2013: p.83).

Given the call for a further critical review of liberal peacebuilding and an analysis that probes beyond the focus on state-building in most peace studies, there has been a marked dearth of studies on the impact of such peacebuilding processes in Africa (Tom, 2011: p.111). However, a growing line of study that criticises liberal peacebuilding in Africa confirms that the debate on liberal peace has a tendency to

tenaciously follow the argument that ‘development is dependent on democracy, and democracy supports peace and stability, further encouraging development’ (Abrahamsen, 2001: p.80). Ironically, what has come to be identified as ‘international determinism’ since the introduction of the SAPs has featured the imposition of procedural democracy (in the early 1990s) through aid sanctions, as well as recent peacebuilding missions and transitional justice experiments in civil wars. The results of these processes are elusive (see both introductions in Sriram and Pillay, 2009; Sriram et al., 2013), but the cost of securing order and security remained high throughout their implementation, and what has been established so far is a ‘virtual peace’ (Taylor, 2007: p.558) or a ‘technocratic peace’ (MacGinty and Richmond, 2007: p.495).

Liberal peacebuilding missions have continually failed to transform the neo-patrimonial logic of the state in the post-conflict environments of Angola, Liberia, Mozambique, Rwanda and South Sudan, and have inevitably produced unintended consequences of renewed violence, unequal access to economic resources, illiberal power alternation and flawed elections. The twin pillars of liberal peace (democratisation and marketisation) have not only failed to reform the neo-patrimonial system that caused the crisis, have continually relied on the existence of such a system (because of the lack of internal hegemony) in securing immediate peace and compromising with peace spoilers (Munive, 2013; Ottoway, 1998; Phiri, 2012; Stroh, 2010; Williams, 2004; Willett, 2005). This has had a further detrimental effect on the existing approach to state-building in liberal peacebuilding enterprises, since ‘the state rather than society is the unit of analysis, even if society is deemed to be the source and target of violence’ (Richmond, 2013: p.301).

The consequence is of course predictable, as the contextualisation of peacebuilding in a neoliberal sense ‘is conventionally understood as principally a product of force, patronage, and power, including external power (as in post-colonial Africa), rather than recognition or to achieve a range of core functions’ (p.302). As a result, the study of rebuilding a state in Robert Bates’ and Paul Collier’s quixotic terming of ‘dangerous places like Africa’ (Bates, 2008: p.17; Collier, 2010: p.45) has not only ignored what Curtin and Dzinesa (2012: p.37) identify as power relations, ideological apparatus and local ownership, but also resembles the *deja vu* evidence that the ‘[p]ost-colonial processes of state formation are, in particular, assumed to imply an illiberal social contract where state resources are used in various ways to support elites and to buy off citizens, preserving local patterns of power responsible...’ (Richmond, 2013: p.301). In this case, the ‘patterns of power’ are responsible for the repressive state that existed before the eruption of the crisis.

Given the considerably critical reflection on the major peacebuilding projects in Africa, this thesis believes that Richmond’s conceptualising peacebuilding is a key to highlight the existing limitation of top-down approach of peacebuilding, especially in African regions. This brings us to the Richmond’s four major generations of peacebuilding research: the first generation of realists who emerged from predominantly positivist traditions of negative peace, and who believed that conflict was inevitable but manageable; the second generation of scholars of liberal institutionalism in peace and conflict resolution; the third generation of liberal peacebuilding studies conducted from the policymaker’s perspective, incorporating the imposition of governance and the top-down approach; finally, there is the

generation of Critical Peacebuilding Scholarship (CPS), with its critics of ‘peace-as-governance’ and their demands for a broader reconceptualisation of peacebuilding as the means by which conflict resolution is transformed into conflict transformation by using the bottom-up approach (2008: pp.97-107). In this thesis, the fourth generation of peacebuilding research has been chosen by the author to be the primary domain in which analyse and clarify the peacebuilding process in Kenya. This decision was made for the following reasons:

- The recent growth in the literature of the fourth generation of CPS opens up further avenues for examining the various activities of peace at the local level, especially on the subject of political reconciliation, inter-ethnic national unity projects and the quest for post-conflict justice that is commonly addressed under the subject of transitional justice. This inevitably helps to bridge the epistemological and methodological gaps between liberal peacebuilding and transitional justice, in which the specific local politics of peace and justice processes in Kenya can be connected to the above-mentioned critical position on liberal peacebuilding in Africa. A particularly important research avenue has been opened up by CPS’ critical reflection on the lack of international commentators’ understanding of the complexity and hybridity of the ‘local’ politics of peace.
- The location of the subaltern agents that have been identified in this thesis as the IDPs, whose narratives provide the reader with a clearer perspective on the responses of the various local agents to the national peace process that is mediated by regional and international stakeholders. The location of these

subaltern agents has helped the research conducted in this thesis to specifically locate the data collected from the semi-structured interviews with the IDPs as primary sources. These sources confirm these individuals' positions as subaltern agents in the bottom-up approach to peacebuilding, as well as confirming the importance of their testimonials regarding the violation of human rights to the delineation of the limits of the transitional justice mechanisms that have been employed in Kenya.

Nevertheless, this fourth generation of peacebuilding research - better known as the CPS agenda—allows this thesis to position its research inquiry in relation to the local political process of reconciliation and transitional justice in Kenya. Yet, before embarking on an attempt to address our primary concern of how to bridge gap in the interaction between liberal peacebuilding and transitional justice in Kenya, we need to operationalise the historical development of transitional justice itself.

III) The Genealogy of Transitional Justice and Its Polygonal Features

The past twenty years have seen the emergence of a proliferation of transitional justice mechanisms, such as criminal tribunals and truth commissions, which promise accountability for perpetrators and compensation for victims in the wake of authoritarianism and civil war. Transitional justice efforts may include - but are not limited to - criminal tribunals, truth commissions (TRCs), lustration, institutional reforms, public memorials, reparations and amnesties. The major intellectual developments of transitional justice can be summarised through the prominent works of Ruti Teitel (2003). There are three major focal points of transitional justice, which can be divided into three separate periods.

The first period is that which covers the post-World War Two years, which prioritised retributive justice and punishment for genocide and the worst forms of human rights violations, as well as systematic and political violence (p.70). The beginning of the second period was marked by the third or 'late' wave of democratisation at the end of the 1980s, following the decline of the Soviet Union in eastern Europe and of authoritarian rule in Latin America (p.81). A third contemporary period of transitional justice was officially marked by the establishment of the ICC in 2003, which gave strong priorities to criminal accountability, instead of amnesty (p.89).

All the types of international tribunals that have operated in former Yugoslavia, Rwanda and Sierra Leone, reflect the increased demand for international legal norms to be integrated into peacebuilding missions (Teitel, 2005: p.845). In debating the actual administration of transitional justice mechanisms, there are three major approaches, currently subject to critical discussion. Firstly, the 'maximalist' approach emphasises the necessity of criminal prosecution, tribunals and punishment, through the philosophical function of retributive justice as a form of deterrence (the basic criminal justice function). Secondly, the 'minimalist' approach is concerned with the political environment of post-conflict justice, and calls for the incorporation of amnesty as a compromise in fulfilling the basic function of retributive justice with an alternative (restorative) form of justice, in which non-legal mechanisms like the truth commission are more relevant and effective in dealing with mass atrocities. Finally, the 'pragmatic' approach calls for a balance between and combination of both retributive and restorative justice (Olsen et al., 2010a: p.17). The current precedents of transitional justice operations in Sierra Leone and Kenya reflect the third approach

(Lynch, 2012/2013: p.33).

The strong international demand for accountability instead of amnesty triggered the creation of the ICC, and marked a return to the predominant theme of the retributive justice measures adopted in the first period (Teitel, 2003: p.90). Scholars like Lutz Ellen and Kathryn Sikkink have coined the phrase ‘justice cascade’ for instances where advocates of the third genealogy, inaugurated by the inception of the ICC, harbor normative legal criticisms of the weaknesses of previous measures (2001: p.2). These include the inability of the post-conflict regime to cope with intra-state conflict and poor judicial capacity, and an increase in peacebuilding missions in Africa (Bosire, 2006; Clark et al., 2009; Clark, 2010; Huyse and Salter, 2008; Lambourne, 2009; Laplante, 2008; Merwe et al., 2009; Pensky, 2008; Peterson, 2009).

Recent research by Lauren Balasco also mapped transitional justice in three major periods of development (2013). In the first period, although the idea of transitional justice had existed before the 1945 war crime tribunal and the 1980 truth commission waves, the concept only entered common usage in the language of policy recommendation following the growing international concern over the systematic violation of human rights and the unstable democratic processes of developing countries (p.199). Hence, this period saw a ‘normative exploration’ of transitional justice as part of the currency of IR (p.200). The second wave was concerned with the growth of transitional justice enterprises and their functions as some of the transitional options afforded to African countries (p.201). Borrowing from Latin America’s experiments, South Africa’s TRC opted for amnesty and restorative justice (Good, 2004; Henrard, 2002; Thörn, 2009). By the middle of 1990s, the growing popularity

of using a criminal, legal language of prosecution and sanction led to the installation of hybrid tribunals, and later the tribunal in Rwanda, Balkans and Sierra Leone. Simultaneously, there was a call for hybridity and more comprehensive approaches, which lead to a growth in comparative studies evaluating the nature and viability of justice tools in war-torn societies, especially the broader impact of such tools on development, democratisation and peace processes (Duthie, 2008; Fukuyama, 2009; Fletcher et al., 2009; Hansen, 2011b; Jeffrey, 2011; Miller, 2008; Tondini, 2008).

As a consequence, this introduced more difficult research themes on the scope of transition, the types of mechanisms employed, cultural resonance, clashes between values and interests, the relevance of the case study being examined and the tools that could plausibly be used for international intervention and other purposes that are not related to transitional justice itself (see Bell, 2009). The ambiguity of its goals, the external factors that limit the effectiveness of its tools, and the broader forms of justice that it encompasses (ranging from retributive and prosecution-based justice to restorative and amnesty-based justice) have challenged the relevance of the field of transitional justice (Arenhovel, 2008: p.580; David, 2006: p.360). The growing literatures of CPS, conflict, security and development have all explicitly and implicitly shaped the polygonal or multifaceted features of present transitional justice practices (Adhikari and Hansen, 2013; Hayner, 2011; McCarthy, 2009; Rage, 2010; Skaar, 2012; Quinn, 2009b). Finally, the current wave of transitional justice follows the relatively recent trend of incorporating methodological concerns about data collection, single or large case studies and the merits of quantitative or qualitative approaches to the field. Despite the growth in literature, evidence to this date has failed to produced a single standard of international measurement, owing to the old

debate concerning the merits of positivist versus critical approaches at the epistemological and methodological levels (Aukerman, 2002; Backer, 2009; Call, 2004; Coomans et al., 2009; Dancy, 2010; Grodsky, 2009b; Klinkner, 2008; Mani, 2002; Nagy, 2008; Olsen et al., 2010a; Olsen et al., 2010b; Rajagopal., 2008).

As a result of the above discussion on the genealogy of transitional justice, the field faces a disciplinary crisis in academic debate and a ‘paradox of success’ in actual practice: ‘[t]he less effective its mechanisms seem to be in their efforts to build democracy and peace, the more we are demanding from them’ (Balasco, 2013: p.198). As a result of the critical challenges it has received concerning the boundary limitations that it shares with older disciplines (such as democracy, human rights, peacebuilding and international development), transitional justice has come under pressure from policymakers, who demand that it expand its missions, and the ‘increased claims’ of scholars of the aforementioned disciplines that it must identify itself with a particular field (p.199). At this juncture, it is appropriate to open the discussion on the thesis’ attempts to bridge the gap between liberal peacebuilding and transitional justice, and plot some of the possible interactions between these fields.

IV) Bridging the Gap between Transitional Justice and Liberal Peacebuilding

At the outset, it will seem reasonable for some readers to question the expediency of pursuing an academic exercise that supposedly bridges the gap between liberal peacebuilding and transitional justice. Rather than dismissing it as mere academic rumination removed from everyday practical concerns, I believe that the analytical discussion proposed here helps to improve the policymaker’s understanding of these fields’ shared intellectual traditions, which is crucial to understanding the interplay

between law and politics in post-conflict reconstruction policy. Such understandings allow the reader to visualise how the local peacebuilding process to address post-election violence in Kenya came to be transformed into transitional justice discourses, and how these furthered the political discussion of transitional justice as power and ideology based on the situation in Kenya.

In framing the relationship between peacebuilding and transitional justice, advocates of peacebuilding have argued that the objectives of transitional justice are compatible with the objectives of peacebuilding (Laplante, 2008: p.339-42). Arguably, both peacebuilding and transitional justice share a liberal cosmopolitan vision of IR. Being a product of the Western Enlightenment, the liberal institutionalist project of the 20th century priorities 'political freedom, democracy and constitutionally guaranteed rights, and [advocates] the liberty of the individual and equality before the law' (Burchill, 2005: p.55), whereas cosmopolitanism can be understood as being an ideology based on a 'consciousness of being a citizen of the world, whatever other affiliations we may have' (Fine, 2006: p.242). It is a projection of a 'worldwide community of human beings' (p.243), which 'seeks to reframe human activity and entrench it in law, rights, and responsibilities' (Beardsworth, 2011: p.15), therefore upholding the 'irreducible moral status of each and every person' (p.16). As a result, a combination of liberal cosmopolitanism's emphasis upon individual human beings rather than the state's agency promotes desirable universal tenets for constructing a better international system, and seeks to challenge the state's exclusive position as the primary moral actor in IR (Freedon, 2010: p.8).

Since the early 1990s, the transition from state security to human security has

provided international space for the liberal cosmopolitan conviction of the necessity of respecting the law in peacebuilding, humanitarian crisis management and transitional justice (Forsythe, 2009; Humphrey and Valverde, 2008; Turner, 2008). This ideology has inspired international attempts to pursue justice through peacebuilding missions; the general view is now that the quest for justice is part of the original vision of peacebuilding (Lidén, 2013: p.83). Indeed, the UN strongly emphasises that there is no peace without law and criminal prosecution (Sriram, 2008: p.3).

The transition from the process of securing post-conflict power sharing to that of establishing a long-term peacebuilding project necessitates the administering of some forms of justice. Most important among these is criminal prosecution, since the causes of violence are often related to impunity (Lira, 2001; Ross and Sriram., 2012; Yusuf, 2007). Impunity is inherent in the renewed cycle of violence, and addressing impunity with certain judicial measures is a precondition to deterring future conflict (Fiss, 2009: p.65). In sentencing Charles Taylor, the Special Court for Sierra Leone (SCSL) acknowledged that the primary objectives of justice were retribution and deterrence (Special Court for Sierra Leone, 2012: pp.3-4). Obviously, retribution was emphasised by the trial chambers in order to acknowledge international concerns about the serious violations of human rights (p.4). The consequence of the verdicts also indicates that the retributive energies of the SCSL need to be tempered by the restorative aims of the Sierra Leone's Truth and Reconciliation Commission (TRC) (Oosterveld, 2012: p.10). This is so that any future violations can be deterred with the help of both the restorative and retributive elements of transitional justice mechanisms. These goals are in line with those of international agents, who side with

liberal cosmopolitanism in their conviction that justice and peace must be pursued simultaneously. The pursuit of justice in the signing of the peace agreement in Zimbabwe and Kenya demonstrates the above argument (see Cheeseman and Tendi, 2010).

While the traditional positions of transitional justice practitioners have always maintained the importance of the impartiality of justice in peacebuilding (as a product of the political process) (Booth, 2001; Linton, 2001; Teitel, 2000), the ICC's prosecutor, Fatou Bensouda, goes on to claim that '[p]eace and justice are two sides of the same coin'(2012b). In line with Bensouda's claim, Kenyan human rights activists argue that justice could be a means of preventing future election violence (interview with KNHRC officer no. 2, Nairobi, March 2, 2012). However, the increasing appearance of ICC officers in nearly every contemporary crisis in Africa has marked a normative shift from the simple moral advocacy of justice towards a legal consequentialist approach. To a certain extent, this challenges the existential functionality or legitimacy of the ICC (Alston, 2010; Vinjamuri, 2012). Pursuing justice in the midst of conflict is usually a matter of political compromise, as almost every agent has a different conception of what constitutes a just society (Pankhurst, 1999: p.241).

The aims of recent Kenyan diplomatic missions to the UN Security Council (UNSC) may seem contradictory to the argument presented by Bensouda and the Kenyan human rights activist (BBC News, 2013b). The mission requests the UNSC to terminate the ICC's intervention on the basis that the pursuit of justice is destabilizing the security of the country. While the UNSC may dismiss Kenya's request as being

more about shielding impunity than maintaining security (since the ICC's chief suspect is currently sitting as Kenya's head of the state), the request obviously espouses the view that the pursuit of justice is incompatible with establishing peace (interview with the ICC officer, The Hague, February 12, 2013).

Nevertheless, the debate about the relationship between peace and justice constitutes a paradigm shift in justifying the reasons for promoting transitional justice. The moral, liberal cosmopolitan argument that justice is simply a good project has developed into a legal consequentialist argument, which asserts that the pursuit of justice is a requirement for establishing peace (see Mallinder, 2007; McEvoy, 2007). Consequentialist arguments have therefore contributed to a broader understanding of transitional justice, in which the pursuit of justice (through the ICC) is not only about dealing with past atrocities, but is also a kind of bargaining chip that shapes the formulation of the power-sharing deal in Kenya and humanitarian intervention in Libya (Vinjamuri, 2010: p.204).

V) A Not So Obvious Relation between Peacebuilding and Transitional Justice?

While peacebuilding and transitional justice share similar liberal cosmopolitan traditions, not all commentators agree on the practicalities of the interaction between and implementation of these two disciplines. This is visible through the transformation from peacekeeping agenda to broadly defined of peacebuilding mission in Rwanda, in which its complicated further the direction of transitional justice in the country. Since the 1990s, it has had an increasingly profound effect on the development of transitional justice. One instance in which it has exerted its influence on the latter can be seen in a way peace research enriched the peace and

violent conflict concept that later influenced the international intervention. In particular of these peace research is a Galtung's research on negative peace (1969; 1975; 1977). Negative peace is a condition that is achieved in the absence of war or direct violence, while positive peace refers to the absence of structural conditions that may produce a protracted conflict (Laderach, 1997: p.5). In return, Galtung's extended definition of violence and conflict leads to an extended definition of peacebuilding (2007: p.208).

By connecting violence to the structure of society, peacebuilding is understood to constitute a wide range of activities, including a focus on justice. '[S]ome tools of transitional justice are explicitly linked to democratic processes. Peacebuilding tools such as judicial liberal reform, reform of the security forces and the inclusion of former rebels and vetted former members of security forces are also often explicitly tied to processes of transitional justice' (Sriram, 2007: p.285). For instance, the UN's missions in Rwanda have seen an increased application of international law in responding to the long-term objectives of peacebuilding *vis-à-vis* transitional justice mechanisms (Schabas, 2005: p.605).

However, the expansion of peacebuilding to include transitional justice creates a further difficulty in evaluating its success (Mani, 2008: pp.254-60). In assessing the ineffectiveness of peacebuilding missions in Africa, William Zartman (1996), Kenneth Omeje (2008) and Donald Rotchild (2005) have observed that the chief problem lies in the way that peacebuilding has been promoted in the African region. These peacebuilding missions were made more complicated by the inclusion of transitional justice in their objectives. For instance, the peacebuilding missions in

Rwanda were complicated by the implementation of the International Criminal Tribunal for Rwanda (ICTR) and the *Gacaca* courts (Ingelaere, 2008: pp.51-7). Initially, the United Nations Assistance Mission for Rwanda (UNAMIR) was enforced in order to facilitate the Arusha agreements (Republic of Rwanda., 1995; The UN., 1993). However, through UN resolutions 1995, UNAMIR's objectives were broadened to include assisting the Rwandan government with 'justice and reconciliation' (The UN, 1994). The integration of the ICTR into the peacebuilding missions has been criticised for getting the rhetoric right, but the strategy wrong (Schabas, 2006a: pp.452-5). Since its inception, the ICTR has cost nearly one billion pounds, but has only succeeded in putting forty-three people behind bars (Pflanz, 2013). There have been twelve others indicted, but the court subsequently freed them after the judges dismissed their cases on the basis of legal technicality errors (Elvarez, 1999: p.481). In short, there has been continued criticism of not only the increased expenditure of the court, but also of the slow implementation of justice measures for establishing peace and enabling reconciliation (interview with AU officer no. 1, Addis Ababa, April 14, 2012). Although immediate peace has been restored since then, the difficulty of achieving retributive justice in Rwanda strengthens the perception that peacebuilding is highly unlikely to restore peace in the long-term (see Waddell and Clark, 2008). This galvanises the issues of the existing debate between peace and justice in the post-conflict reconstruction agenda (Ford, 2009: p.67). The suggestion is that the integration of transitional justice makes peacebuilding missions more prone to failure.

While the Gordian Knot of disagreements and tensions grows ever tighter in Kenya, this thesis largely agrees that the shared tradition between peacebuilding and

transitional justice ensures that the fusing of these two concepts into an international vision of a hybrid solution to political crisis on a global scale remains credible. This is particularly true in relation to the specific kind of crisis that is required to address global concerns of human rights violations in the process of drafting local peace agreements. The question of how transitional justice can incorporate a human rights agenda into a peacebuilding programme will be discussed in the next section.

VI) Incorporating Human Rights Agenda in Peacebuilding: A New Direction for Transitional Justice?

The increase in the ratifications of international human rights documents has helped to facilitate the co-existence of human rights and humanitarian laws in peacebuilding missions (Bell, 2008: pp.78-104). The gradual infusion of a human rights agenda into the peacebuilding process helps to highlight that, at its core, the jurisprudence arising out of both treaty and customary international law not only lays out specific legal contours concerning the rights of the victims or the reparations due to them, but also serves as a critical strategy for achieving the central aims of the transitional justice mechanisms discussed above. The Universal Declaration on Human Rights (UDHR) of 1948, the International Covenants on Civil and Political Rights (ICCPR) and the Economic, Social and Cultural Rights (ICESCR) documents have contributed to the development of a more sophisticated system for the defence of human rights (Hansen, 2008: pp.131-51). In particular, this has been achieved through the integration of these human rights documents with the enforcement of the Rome Statute in 2003, and the operations of the ICC.

As a result, this has produced an increased focus on the language of human rights in

peacebuilding missions across the globe (Bell, 2000: pp.193-5). As Paige Arthur has argued, human rights provides a type of language with which a post-conflict reconstruction agenda can contextualise transitional justice, violation and crimes against humanity (Arthur, 2009: pp.312-3). The implementation of peacebuilding, particularly through peace agreements, power sharing, electoral assistance and constitutional advice, marks the transition from conflict to immediate peace.

However, the process of securing peace is unlikely to come to fruition without some form of amnesty for preventing the future investigation and prosecution of former combatants (Ross and Sriram., 2012: pp.46-58). By the 1990s, only a few of the peacebuilding missions that ended civil war had included amnesty bargains, such as the peace processes in Liberia (1993) and Sierra Leone (1999) (Mutwol, 2009: pp.24-5). Unfortunately, the particular amnesty bargains within these peace processes were not recognised by international human rights and criminal law, and could not be isolated from the globalising norms of crimes against humanity (Stensrud, 2009: p.6). As a result, the SCSL did not recognise the amnesty bargain that was produced by the Lome Peace Accord (Kelsall, 2009: p.229).

Learning from the pitfalls of the Sierra Leone peace process, all subsequent mediations of peace processes and power-sharing arrangements in Sudan, Uganda, Burundi, Zimbabwe, Ivory Coast and Kenya have prescribed a notably limited amnesty (in some cases abandoned afterwards), calling for more criminal indictments, trials, institutional reforms and reconciliations on a national level (interview with AU officer no. 2, Addis Ababa, April 15, 2012).

By 2000, most peacebuilding missions under the banner of the United Nation (UN) and the African Union (AU) had begun to integrate various transitional justice measures as part of effecting the transition to peace (Dorina, 2008: pp.131-5). Around the time of Kenya's attempt to deal with post-election violence, transitional justice appeared to be a predominant theme of peacebuilding (fieldwork note no. 2, Nairobi, March 25, 2012). Particularly, South Africa's TRC and the ICC's 18 cases mostly reinforced the UN, the AU and Kenyan civil society's perceptions that a viable solution to post-election violence could only be found in the integration of transitional justice as part of the power sharing deal (interview with Kenyan Government official no. 1, Nairobi, March 17, 2012).

In regards to the above discussion, what remains pertinent is the consideration of how a plausible transitional justice mechanism can be understood in the context of its application within the domain of peacebuilding. The answer to this question lies in the diplomatic attempt to resolve the political crisis, or to force the warring parties to comply with a human rights agenda within a specific agreement that acts as a conflict resolution mechanism in many cases of civil war. This agreement is commonly known as the power-sharing arrangement. The next discussion will provide a brief illustration of how this power-sharing model acted as the precise instrument or institutional arrangement that bridged the gap between transitional justice and liberal peacebuilding in the Kenya situation.

VII) Enclosing Transitional Justice and Peacebuilding in a Compromise Power Sharing Bargains

In light of the above discussion, Recent research has raised concerns about the danger

of enacting transitional justice through a power-sharing peace agreement, as witnessed in Kenya and Zimbabwe (Vandeginste and Sriram., 2011: p.489). First, this section gives an explanation of the primary factors that led to the recent power-sharing arrangements in Africa; the power-sharing arrangement is then operationalised based on the conceptual framework developed by Nic Cheeseman. Finally, the concept of power-sharing is utilised to position Kenya's power-sharing dynamic in relation to other examples, and to highlight the institutional hindrances it has placed on the country's democratic reforms and attempts to administer justice.

i) Why Power Sharing is Popular in Africa's Recent Crisis?

Adopting a liberal peace approach to resolving disputed elections, the idea of transitional justice as a broad legal measure for coming to terms with rulers' past wrongdoings has found its way into the AU mediation processes, during the establishment of the power-sharing deal between President Kibaki and Prime Minister Odinga (interview with AU officer no. 1, Addis Ababa, Ethiopia, April 14, 2012). There has been a vast number of scholarly publications examining the effects of power sharing in resolving most of the recent political violence in Africa (Jarstad, 2009; Lemarchand, 2006; Levitt, 2006; Mehler, 2009a; 2009b; Spears, 2000; Sriram, 2008). The consociational democratic practices taken from European models like those of Belgium and Switzerland have catalysed the policies and publications of various power sharing prototypes in countries that are deeply divided, as well as African countries that have emerged from civil wars, such as Angola, Burundi, Rwanda and Somalia (Bogaards, 2006; Hartzell and Hoddie, 2003; Hoddie and Hartzell, 2003; Rotchild and Roader, 2005; Schneckener, 2002; Spears, 2002; Tull and Mehler, 2005; Watts, 2001).

The relatively stable peace conditions of these African cases have perhaps inspired the adoption of looser models of power sharing in the disputed elections of Kenya and Zimbabwe (Cammett and Malesky, 2012; Cheeseman and Tendi, 2010; Cheeseman, 2011; Horowitz, 2008; Sriram and Zahar, 2009; Svolik, 2009). While the literature recognises the anomaly⁵² that the prototype of power-sharing in disputed election cases does not belong to the classical notion of the power-sharing formula, it is also important to recognise that there are three major factors that contribute to the adoption of power-sharing in such disputed election cases. Firstly, since the return of multiparty democracies has continually failed to subdue the outbreaks of violence that come with the alternation of power between one leader and another, the power-sharing formula has been regarded as a popular alternative (Amadi, 2009; Branch and Cheeseman, 2009; Cheeseman and Tendi, 2010; Roeder and Rotchild, 2005).

Secondly, learning from the relative “success story” of ending the ‘classic’⁵³ civil wars of Africa, and recognising “the play-safe” approach of not disrupting the local power interests for fear of inducing a spill-over effect in regional instability, the AU preferred to adopt the liberal peace mode⁵⁴ of power sharing to “stabilise” the crisis, but without interfering in the domestic affairs of the country (Akonor, 2010; Jalloh et al., 2011; Kiwuwa, 2013; Lemarchand, 2006; Okumu, 2009; Rotchild and Roder,

⁵² Violence resulting from election disputes is broadly understood as being a low intensity level of conflict, compared with cases of more sporadic violence, such as the civil wars in Rwanda, DRC, Sierra Leone, Liberia, Angola and Mozambique. See Cheeseman and Tendi, 2010; Sisk, 2006; Spears, 2000.

⁵³ The adoption of the power-sharing formula is commonly proposed in civil war cases. Recent power-sharing peace agreements in disputed elections in Africa have improvised the practices, implementing them without clear key institutional arrangements. The practices have mostly been implemented subsequent to the disputed election, and simply serve the purpose of stopping further hostilities between conflicting parties that could destabilize the country. See Hartzell and Hoddie, 2003; Mehler, 2009b; Norris, 2008; Vandeginste and Sriram., 2011.

⁵⁴ For a detailed discussion on the adoption of the power-sharing formula as part of liberal peacebuilding and the AU regional interest, see Brown, 2011a.

2005; Wolff, 2007). Finally, power sharing has been instrumentalised in order to guarantee that the incumbent will retain power, and the loser of the election will join in the power collusion that resembles the single-party period of the 1970s (Barkan and Matiangi, 2009; Brancati and Snyder, 2012; Chaisty et al., 2014; Doorenspleet, 2013; Dunning, 2011; Goeke and Hartmann, 2011; Joshi and Rosenfield, 2013; Reilly, 2013). Nic Cheeseman's study of the power-sharing dynamics (2011) provides some plausible explanations for the impact of such institutional arrangements upon justice- and reconciliation-seeking policy.

ii) Defining Power Sharing Trends in Africa: The Variable Relations between Elite Cohesion and Distribution of Violence

The literature on power-sharing often reveals two crucial variables that shape its dynamic: elite political cohesion and the distribution of violence (Cheeseman, 2011: pp.339-40). I believe that the interaction between political cohesion and the distribution of violence developed by Cheeseman provides a framework for explaining the potential influence of power sharing on transitional justice currently embarked in Kenya. The first variable refers to the elite's political cohesion and depends on two sub-factors: the history of political coalitions and the history of political violence (p.341).

The history of political coalitions refers to the duration of time in which the factional elite in divided societies have had a history of finding common political goal. The history of violence refers to a condition in which violence that has repeatedly occurred hardens or strengthens the inter-elite coalition (p.342). Cheeseman concludes that any power-sharing arrangement that arises out of even a short period of

disputed elections is more successful than a longer period of civil war (p.340).

The second variable is the distribution of violence, which refers to the capacity of warring parties to employ violent measures in retaliating towards their opponents (pp.342-3). Power-sharing often emerges when there is no clear victory, which poses questions about actors' voluntary compliance in withdrawing from violence (Sisk, 2006: pp.1-40). The degree of violence is higher if the warring parties that participate in the power-sharing agreement have committed equal atrocities during the period of violent conflict, which limits the future development of transitional justice (Cheeseman, 2011: p.344). By contrast, the degree of violence is lower if the atrocities committed during the violence period have not evenly distributed among all conflicting parties, or if only one factional group has committed heinous crimes (p.345). This produces likely conditions for the use of strong language of criminal accountability and an investigation into past wrongdoings and rights violations, as evidenced in South Africa (p.346). The government recognises that a volatile scenario may emerge if the quest for addressing impunity is highly influenced by a prosecution option that is biased towards a particular factional group, as transitional justice will inevitably be politicised by the elite.

Chesseman later concluded his model for analysing the four most likely predictions for post-power-sharing developments in Africa, and selected seven.⁵⁵ African countries for the following model:

⁵⁵ These countries had all made a power-sharing arrangement either before or after elections, with each country adopting a form of power-sharing that emerged from a peace agreement put forward by an interim unity government in the aftermath of disputed elections or civil wars. In these selected cases, there was a legal obligation to pursue broadly goals of political reconciliation and justice among the conflicting parties.

Figure 2.1: Model of Power Sharing Dynamic (Cheeseman, 2011: p.343)

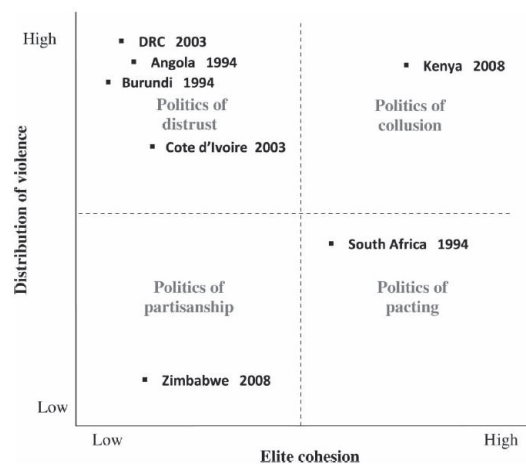
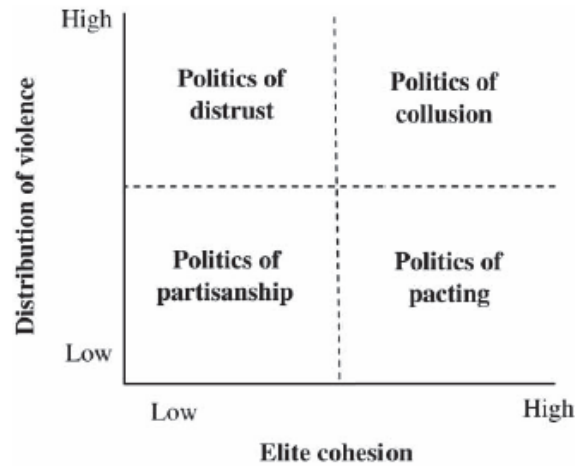


Figure 2.2: Model of Power Sharing Dynamic (Cheeseman, 2011: p.343)

iii) The Impacts of Power Sharing upon Transitional Justice in Kenya

In his analysis, Cheeseman suggests that Kenya belongs to the ‘politics of collusion’, in which the distribution of violence and elite cohesion are both high (p.344). All of the elite barons have one motive in common: to prevent any future demands for criminal accountability for the post-election violence. At the same time, they also recognise the importance of overriding any particular ethnic alliance in order to thwart public demands for reform and justice (Cheeseman, 2009; Lynch and Anderson,

2013; Rotchild, 1973).

Meanwhile, the increase in violence has also contributed to a negative reconfiguration of ethnicity, without preventing future inter-ethnic coalitions. All major elite factions have been widely believed to share some form of responsibility for the atrocities that eventually led to an international (as well as national) pressure on the ICC to provide criminal accountability (interview with the ICC officer; The Hague, February 12, 2012). These calls for justice invoked the language of crimes against humanity, since Kenya is a signatory of the Rome Statute (Sriram. and Brown, 2012: p.222).

The combination of both a higher degree of elite cohesion and the distribution of violence has been characterised by anti-reforms alliances, since none of the local politicians are committed to transitional justice (interview with the ICC officer; The Hague, February 12, 2012). In such instances, Cheeseman's model of the power sharing dynamic may reveal the difficulty of implementing transitional justice in Kenya, and signifies a broader antinomy between power sharing and transitional justice. This was especially the case in debates regarding land tenure reform and historical injustices, in which the specific issues of transitional justice and human rights became dangerously connected to this more general debate (Elhawary, 2009; Huggins, 2009a; Lynch, 2009; Vandeginste and Sriram., 2011).

What injustice means, and how the explicit mechanisms of transitional justice can be connected to this debate, remain contested. Despite talks on addressing the systematic injustices having been acknowledged, the contested concept of transitional justice has been expressed in a divisive manner and through the politics of control (Musila,

2009a; Willis and Chome, 2013; Zwier, 2013). The local politicians are not keen enough to develop a practical strategy with which to identify the key agendas for transitional justice options in Kenya (interview with the ICC officer, The Hague, February 12, 2012). As a result, the impoverished debate on the options for transitional justice among Kenyan MPs is more concerned with protecting the interests of power holders rather than addressing the actual grievances of victims (Annan, 2010: p.2).

C – Responding to the Literature Reviews: Clarifying the Key Ideas and the Position of this Thesis

In this section, some key debates in the literature of peacebuilding, transitional justice, and power-sharing have been revisited in order to formulate some general assumptions about justice- and reconciliation-seeking policies that are deeply embedded in the interaction between the literatures of peacebuilding and transitional justice. In order to contextualise the relationship between transitional justice and peacebuilding, this thesis assesses how both fields colluded with each other. Additionally, it attempts to explain how peacebuilding broadened or enriched the conventional projection of transitional justice beyond its legal personality. I believe that this trend should not be neglected in future research. As such, several major focal points should be clarified before we move to the proposed conceptual framework for power and ideology in Kenyan National Dialogue and Reconciliation (KNDR).

I) Bridging Transitional Justice and Peacebuilding through Power Sharing

It is obvious that most peacebuilding literature is normative and concerns itself with the ‘political question’ of rebuilding the state. The literature of transitional justice,

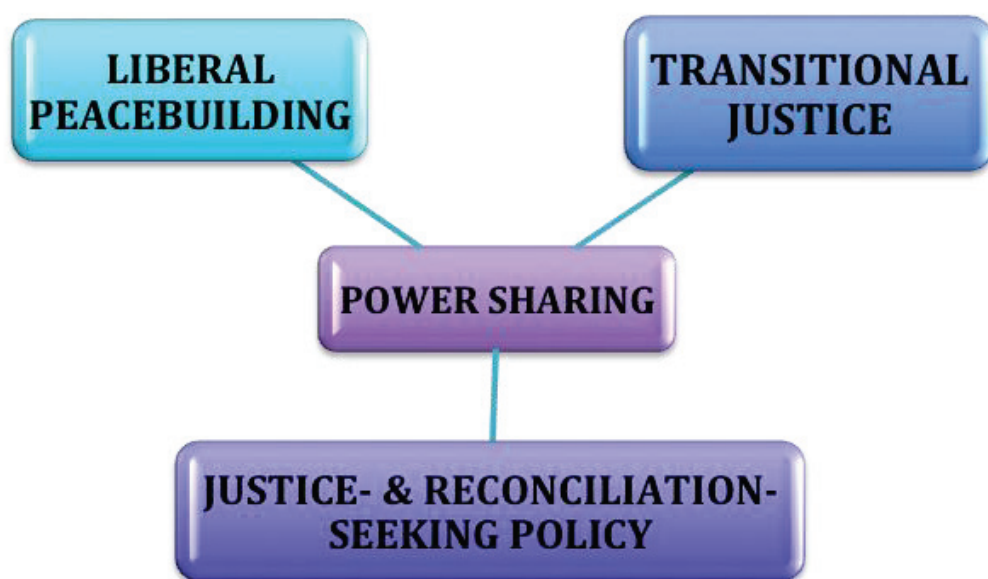
meanwhile, is mostly concerned with not only the ‘legal question’ of how to strengthen the rules of law, security and order, but also the political implication of adopting legal and non-legal mechanisms in post-conflict reconstruction policy. Traditionally, peacebuilding and transitional justice literatures and practice either have not engaged with one another or have been in tension, or even opposition. Yet, this thesis posits the ideas, its domains, institutions and mechanisms explicitly and implicitly intersect with each other, either in the form of the external imposition of top-down processes, or they are ‘invited’ by the local conflicting parties in order to regulate local crises or to detract immediate public attention from the crimes and atrocities perpetrated during the violent conflict.

In surveying both literatures, this thesis discovered that, in terms of theory and practice, both peacebuilding and transitional justice have been isolated from each other in the past but now share certain common assumptions about rescuing victims or members of the population who live in the conflict zone. Therefore, it can be argued that transitional justice and liberal peacebuilding have become entangled, and share a deeper affinity with the liberal cosmopolitan ideas of post-Cold War IR. The growth in critical literatures and post-conflict evaluations has highlighted and provided further suggestions for the increased interaction between peacebuilding and transitional justice. It has also indicated the fundamental interaction between law and politics in post-conflict reconstruction studies. The peacebuilding objective of addressing impunity, strengthening the rule of law and drafting constitutions provides a plausible explanation of the present and future direction of contextualising transitional justice through peacebuilding practices.

However, this thesis treats the Kenya situation as a curious anomaly, as in this case,

the specific device of power-sharing as an institutional arrangement is the actual instrument that allows the transmission and intertwining of ideas between peacebuilding and transitional justice. This entanglement of ideas created a precarious predicament, in which national attempts to address electoral violence initiated a chain of consequences that facilitated the development and application of transitional justice mechanisms (see Figure 2.3). This kind of predicament is aptly described as ‘precarious’, as the entire peacebuilding project of mediating electoral violence and promoting national reconciliation not only intersected with the transitional justice institutions’ attempts prosecute the perpetrators of criminal atrocities, but also shaped some of the country’s subsequent political concerns and sustained tensions. These tensions continue to hinder the development of transitional justice, in particular by affecting the debate concerning whether to pursue justice or peace. A detailed analysis of the specific aspects of Kenya’s power-sharing arrangement that produced the Justice- and Reconciliation-Seeking Policy will be discussed in Chapter 3.

Figure 2.3: Mapping the Relationship between Peacebuilding and Transitional Justice through Power Sharing



II) The Implication of Power Sharing upon the Uncertain Direction of Transitional Justice Agenda in Kenya

This chapter has drawn its analysis from selected CPS literatures that emphasise the increasing clashes between transitional justice and peacebuilding, especially in regards to power-sharing arrangements. The debate about the most suitable mechanism with which to deal with the past as part of the power-sharing formula has ventured into dangerous terrain, in which transitional justice is recognised as a permissible form of justice despite being indeterminate in forming a realistic strategy for post-conflict reconstruction.

The presiding international dynamics of the power-sharing formula in resolving the disputes surrounding local elections provides transitional justice with a difficult task; one that is based on reaching political compromise rather than on punishing perpetrators. Power-sharing has arguably left human rights violations and criminal accountability isolated from each other. The national power-sharing deals are dissociated from criminal accountability, and have become a type of rhetorical discourse that motivates political legitimacy with talk of national unity and reconciliation.

Nevertheless, in discussing the anomalous and hybrid features of transitional justice in peacebuilding practices, several limitations should be recognised here. The adoption of power-sharing provides a unique view of justice during the transitional period as an exceptional instance of law in post-conflict societies. However, the danger of viewing

transitional justice in this way lies in the agents' tendency to manipulate human rights and ICL. Once it has been deemed to be 'transitional', justice- and reconciliation-seeking policy can be characterised as being beyond the straightforward understanding of justice. The deep, normative commitment to human rights language reduces transitional justice to a strategic toolkit, or a mechanism that is up for grabs for any powerful actor or peace-spoiler that wishes to wage war, prosecute enemies, or manipulate victims, including MNCs and NGOs.

III) Positioning the Low-Intensity of Post-Election violence within the Spectrum of the CPS Approach to Peacebuilding

This thesis adopts a CPS perspective on liberal peacebuilding in relation to international attempts to put an end to the ubiquitous outbreaks of violent conflict in Africa. In this respect, the focus of the research inquiry is concentrated on a bottom-up approach to peacebuilding, and includes a critical assessment of how predominantly local peacebuilding processes in Kenya can be valued and connected to the broader CPS position on liberal peacebuilding operations. Consequently, the ensuing discussion in Chapter 3 that specifically deals with Kenya's infrapolitics and local peacebuilding processes allows this thesis to highlight the political dimension that structured the transitional justice industry.

Given the continued peacebuilding discontents in Africa, there remains the problematic but legitimate question, however, of whether or not to bring a debate about peacebuilding and transitional justice into the case study of Kenya in analysing the measures undertaken by the GNU to address the post-election violence. In the peacebuilding literature itself, Daniel Lambach has warned about this conceptual problem that arises when one attempts to incorporate various low-intensity conflicts

into a 'mainstream reading of peace and conflict analysis' of inter-state conflict, such as that generated by the allied forces invasions of Iraq and Afghanistan (2007: p.5). 'The prefix 'post-' is a temporal signifier attached to a noun (conflict) that has no fixed temporal content' (p.9) with the consequent word of 'conflict', which is usually associated with war studies. Meanwhile, the term 'post-conflict' (usually referring to reconstruction) is rooted in peace studies. In many post-conflict scenarios, such as those of Rwanda (Reyntjens, 2004), Uganda (Shaw and Mbabazi, 2007) and Sierra Leone (Millar, 2013), although violence can be successfully halted, the desirable condition of peace remains elusive. This creates a precarious predicament, identified by MacGinty (2010) as a 'no war, no peace' situation.

Evidence collected so far accounts for three types of post-conflict situations: firstly, when the actual period of war has been ended by a peace agreement; secondly, when the conflicting parties have signed the peace accord; finally, in the event that one side is clearly victorious, which forces the opposing faction to surrender unconditionally (Lambach, 2007: p.11). While the first and second types of situation have definitely arisen in Kenya (Chapter 2), the third has rarely occurred in recent post-conflict situations generally. In this thesis, the best approach is to adopt Lambach's pragmatic definition of 'post conflict': a state in which open violence has ceased and is no longer a predominant issue, while the temporal and spatial dynamics of the post-conflict zone are generated by the social experiences of the victims' and survivors' desire for peace or reconciliation, even if these desires are manipulated by the power relations and ideological apparatus of the national elite (p.11). In such instances, this thesis agrees with Chandra Lekha Sriram's readings of the Kenya's situation, and her argument that it:

did not experience a violent conflict akin to civil war, but rather brief and severe election-related violence, albeit with an internationally mediated agreement akin to the power-sharing peace agreement. It has not experienced an international peacebuilding presence, nor have militias involved in the violence been demobilized. It is difficult to argue that it has undergone a political or post-conflict transition. Yet it has had national debate about a range of transitional justice measures and the subject of four ICC prosecutions. (2013: p. 265)

What matters here is the significant impact of pursuing transitional justice ‘in the absence of transition...’ (p.265) and ‘in the wake of conflict’ (p.266), which makes it nearly impossible to map the processes of justice- and reconciliation-seeking policies in Kenya without entangling transitional justice research within peacebuilding domains. While some anomalies in the study of types of conflict (such as post-election violence) or justice- and reconciliation-seeking policies hardly make a case for a typical case study of peacebuilding and transitional justice, policymakers’ and commentators’ adoption and discussion of justice- and reconciliation-seeking policy through a liberal peace mode of power-sharing has facilitated a move towards a line of research that is commonly associated with both the fields of peacebuilding and transitional justice. This kind of interdisciplinary interaction constitutes a case study for both peacebuilding and transitional justice, especially when several (hybrid) characteristics, elements, time-sequences and instruments related to both fields can be identified during and after the electoral violence period.

Hence, this thesis has adopted a pragmatic position by positioning the GNU’s attempts to put a stop to Kenya’s low-intensity electoral violence as part of the liberal peacebuilding understanding. Its central assessment of the ICC’s and TJRCs relations with the IDPs is used as a primary means of uncovering the political complexity behind the process. This discussion in Chapter 3 conduct a brief exploration of the international and local attempts to end the conflict through the power-sharing

agreement that gave birth to transitional justice discourses in Kenya.

IV) Exploring the Scope and Key Concepts of the Thesis: Reconciliation, Peace and Justice

It is important to emphasise that the study of transitional justice in Kenya that is conducted in this thesis is influenced by the author's academic background in political studies rather than in the legal aspects of the field. The author is most intrigued by the popular views of 'transitional justice as a political process' in Kenya (interview with TJRC Officer no. 1, Nairobi, February 5, 2012). In this section, I will place conceptual boundaries upon some of the keywords of my thesis. Unless specified otherwise, the following explanation shall be generally applied referred to the majority of the keywords used throughout the thesis:

i) Reconciliation

Surprisingly, although reconciliation is one of the most thoroughly researched subjects in post-conflict studies, very little substantive material is available on it (Laderach, 1997: p.15). Perhaps, the problem is neither with Kenya nor any other specific case study, but with the manner in which reconciliation studies (as a part of peacebuilding literature) and transitional justice have been isolated from each other. The study of transitional justice as an instrument for national reconciliation projects in various post-conflict environments has been academically recognised for ten years (Quinn, 2009b: p.7). In turn, this has encouraged scholars and practitioners of law and politics to focus their energies on the subject of post-conflict reconstruction; the process by which a society moves either from being in a state of war to a state of peace, or from being an authoritarian regime to becoming a democratic society

(Hegarty, 2002: p.99).

While others view the subject of reconciliation as a subset to the study of transitional justice (see Darby, 2010), this thesis refuses to confine the concept of reconciliation to a rigid definition. ‘We can make the theory less restrictive (so it covers a broader range of phenomena and is exposed to more opportunities...)’ (King et al., 1994: p.16). Furthermore, Daly Sarkin and Erin Jeremy state that the epistemology of reconciliation in divided societies must be re-engineered by means of gaining a precise understanding of it. Additionally, integrative methods that are more sensitive to the subject must be used, rather than simply relying on international prescriptions (2007: p.27).

For the purpose of our analysis, ‘reconciliation shall be defined as the attempt to build or rebuild a relationship of today that is not haunted by the vengeance of yesterday’ (Quinn, 2009b: p.5). Acknowledging that the dynamics of reconciliation operate at various levels, it is important to recognise that both personal and political reconciliation can mean very different things to different people. In some cases, reconciliation can mean mutual coexistence. In other cases, it signifies the normalisation of relations.

Similarly to the likely situation of Kenya, at the national level, reconciliation symbolises re-establishment, and a broad sense of inter-ethnic relations can be seen as part of this reconciliation (see Huyse and Salter, 2008). This thesis recognises the difficulty of constructing a watertight definition of reconciliation. Some have envisioned it as a broad socio-political transformation process effected by legal means

in deeply divided societies (see Bloomfield et al., 2003). Post-conflict societies may be placed in the same category as countries with significant internal divisions resulting from severely oppressive practices, human rights abuses, communal violence, continuous repression by the state (or a particular dominant community in terms of power relation and material resources), or breaches in the civic trust. Hence, the study views reconciliation as an idea that must be located within a specific social reality and local contexts. As former Kenyan anti-corruption czar, John Githongo notes, reconciliation begins with restoring the public's faith in state institutions (state-society relations) (2010: p.4). In other words, the two transitional justice mechanisms (the ICC and TJRC) explored in this thesis will be evaluated based on the extent to which they have succeeded in restoring harmony in state-society relations since February 2008. For this is very consistent with the original 4 agendas as envisioned by the KNDR agreements at the national level, a power sharing agreement and blue print that not only ended the 2008 crisis, but open to a road map for translating the abstract ideas of national reconciliation and unity through the transitional justice institutions.

In this thesis, a particular emphasis will be placed on how these transitional justice institutions reconcile or restore the normalisation of the social, economic and political positions of the IDPs, from being homeless to being reintegrated into society. If this process is carried out successfully, the IDPs are left with better prospects and a stronger degree of faith in the state apparatus and its ability to protect their safety and dignity in the long-term. Such a process of reconciliation focuses not only on what is commonly referred to in peacebuilding literature as 'positive peace' or 'sustainable peace'; this process is also connected to some of the major human rights documents

that have already been identified as being central to the liberal cosmopolitan aim to secure justice, democracy, peace and development. Specifically, Kenya's final TJRC report hinted at the scope of this aim,

Truth commissions have traditionally been viewed as providing an alternative to the more traditional retribution-based view of justice. They are one of a number of institutional innovations that further restorative rather than retributive justice. The [Kenyan] Commission followed in the footsteps of many of its international predecessors in emphasizing an approach to justice that weighs more towards restorative than retributive justice... While the Commission adopted a notion of justice that encompasses more than its retributive elements such as punishment, it also recognises the important role that retributive criminal justice systems can have in furthering not only justice, but also truth and reconciliation.

The elements it identified include that: reconciliation is both a goal and a process; it is experienced at different levels (intra-personal, inter-personal, community and national); and that reconciliation has linkages to redistribution in terms of material reconstruction and the restoration of dignity. Similarly, the Sierra Leone Truth and Reconciliation Commission conducted its reconciliation work on the premise that 'there is no universal model of reconciliation that can apply to all countries' (T.J.R.C., 2013, Vol. 1, pp.46-47)

However, as shall be revealed in Chapter 3, the heavily political nature of the ICC and TJRC's discourses has detracted focus away from the objective of addressing the humanitarian crisis in Kenya, concentrating it instead onto a politicisation of ethnic discourses of rights and inequality. As a result, this thesis focuses on the IDPs' narratives in Chapters 4 and 5 in order to highlight the fact that these institutions failed to address the problems of the IDPs, whose political subjectivity and agency were denied in the process of imposing these institutional structures.

ii) Peace

Having resolved the conceptualisation of political reconciliation through these two transitional justice mechanisms, it remains to elucidate the conception of peace that this thesis utilises. As the earlier discussion on the literature of the peacebuilding had hinted at, 'peace' here is best understood when viewed through Galtung's lens of

‘positive peace’. This term came to evolve with Laderach’s coining of the term ‘sustainable peace’, which drew partly from Ghali’s *UN Agenda for Peace*, the influence of which is easily identified in Kenya’s power-sharing agreement, KNDR Agenda Item Four: ‘Long-Term Issues and Solutions’ (see Table 2.2). In short, it is understandably claimed by most stakeholders in Kenya that, without addressing the long-term issues that lead to the 2008 crisis, the country remained in a permanently hostile condition of negative peace. Galtung describes this condition as being defined by the fact that, while direct violence in the form of actual political violence conflict has disappeared, the structural conditions that facilitate the outbreak of future violence remain intact.

Table 2.2: Excerpt from the Kenyan National Dialogue and Reconciliation: The Power Sharing Agreement

Kenyan National Dialogue and reconciliation Agenda Item Number 4: Longer-Term Issues and Solutions	
Poverty, the inequitable distribution of resources and perceptions of historical injustice and exclusion on the part of segments of the Kenyan society constitute the underlying cause of the prevailing social tensions, instability and cycle of violence. Discussions under this agenda item will be conducted to examine and proposed solutions for long- <i>inter alia</i> :	
I.	Undertaking constitutional, legal and institutional reform (constitutional review);
II.	Tackling poverty and inequity, as well as combating regional development imbalances;
III.	Tackling unemployment, particularly among the youth;
IV.	Consolidating national cohesion and unity (ethnic politics);
V.	Undertaking a Land Reform;
VI.	Addressing transparency, accountability and impunity
The conflicting parties agreed that Agenda items 4 would be resolved within a period of one year after the commencement of the Dialogue (launched 28th January 2008).	

Source: KNDR Secretariat, Nairobi, 2009

It is important to highlight the fact that, while Kenya has had to confront various types of internal violent conflict since it became independent (such as terrorism and militant insurgency, military coups, urban civil strikes, inter-ethnic riots, food security,

inequality in rural areas and water and cattle rustlings among the pastoral community), this thesis concentrates its primary analysis on the 2008 post-election violence. By focusing primarily on this event, I am not suggesting that all other crises are irrelevant or unimportant. Indeed, they all indirectly connected to the realisation of positive peace and the future prevention of election violence. Yet, a detailed, extended analysis that covers every singly type of violence that Kenya has had to confront remains beyond the scope of this thesis. The structural causation of the 2008 crisis discussed in Chapter 3 can also be used to describe other types of violence that Kenya was forced to confront; however, this does not mean that I intend to expand my analysis to cover each type of violence. While others may disagree with this academic strategy, my intent is only to highlight that understanding these types of structural violence or negative peace as the primary causes of the 2008 crisis is crucial to realising potential threats to any current and future attempts to mitigate violent conflict, impunity and injustice. It is the question of how best to respond to violent conflict, impunity and injustice that are debated through the medium of the IDPs' responses to the ICC and TJRC.

A comprehensive analysis of agenda four of the KNDR agreement is also beyond the scope of this thesis; it even lies beyond the interim mandate of the ICC's and TJRC's jurisdiction in Kenya. Suffice to say, however, that the question of whether some of the agendas under item number four will be pursued remains uncertain. It is also unclear whether the pursuit of additional agendas will be allowed to exceed the KNDR's stipulated target of one year. However, it is true to say that these agendas appeal directly and indirectly to the entire mechanism of transitional justice in Kenya, in particular in relation to the issues of impunity and accountability. As will later be

discussed in chapter 4, local politicians in Kenya often preach that the denomination of peace is a 'political currency'. This claim is also popularly made by the ICC's suspects, who are mostly advocates of negative peace. These local elites' or political agents' advocacy of negative peace as an alternative to justice in order is, of course, a pretext. Discoursing in favour of negative peace serves to inhibit and dilute the ICC's proceedings, which not only renews the fictional clash between peace and justice, but also exposes the lack of understanding of power relations and ideological apparatus within the existing literature of transitional justice in Kenya. This brings us to the essential component of this thesis concerning the idea of justice as it is practised in Kenya.

iii) The Idea of Justice and Transitional Justice Mechanisms or institutions Focuses in Kenya

Having resolved the conceptualisation of political reconciliation through the transitional justice mechanisms, it remains to elucidate the conception of justice that this thesis adopts. In this thesis, two major transitional justice mechanisms will be explored: the ICC, and the TJRC. Coinciding with the Rutie Tietel's third genealogy's call for a broader scope of transitional justice (see Teitel, 2000), the AU's negotiation teams in Kenya seem convinced of the necessity of combining both retributive and restorative measures in mediating the power-sharing peace arrangement, and in making the language of transitional justice an integral part of the post-election violence agendas (interview with KAF officer no. 1, Geneva, November 25, 2010).

Table 2.3: Excerpt from The Agenda Item Two – Measures to Address Humanitarian Crisis

The final goal of the Kenyan National Dialogue and Reconciliation is to achieve sustainable peace, stability and justice in Kenya through the rule of

In reviewing the literature on transitional justice, I have identified that the two major philosophical strands of justice (retribution and restoration) can be connected to the two popular transitional justice mechanisms that are most widely debated in Kenya: the tribunal and the truth commission. In addition, several other ideas related to justice (such as reparation, rehabilitation and redistribution) are explicitly and implicitly connected to the central theme of transitional justice as a mechanism. This mechanism, of course, is defined by the liberal peacebuilding agenda of reconciliation and positive peace at the local level, as well as a bottom-up approach and the focus on the victims or their dissident views. As such, this allows the thesis to capture and to contextualise the IDPs' narratives as victims' perspectives. While others might suggest that the incorporation of (re)distributive justice into existing philosophical concerns with transitional justice's potential for implementing retributive and restorative justice is problematic (see Carranza, 2008; Duthie, 2008; Greiff, 2009; Mani, 2002; Miller, 2008), it will be nearly impossible for transitional justice mechanisms to deliver such ambitious demands for justice (Chapter 5).

It is equally important to emphasise that such an expansive conception of transitional justice is not unique to Kenya, but shares a deep affinity with political liberalism or, more specifically, the theory of liberal cosmopolitanism discussed earlier. 'The UN and other 'experts' in the field of transitional justice, have long, albeit implicitly, defined the end goal of peacebuilding and transitional justice operations as being the cultivation of some form of liberal democracy' (Andrieu, 2014: p.86). Positive peace,

as defined by Boutros Ghali, employs a wide range of political and legal mechanisms in its attempts to nurture democracy and to prevent the recurrence of violence. Such a hybrid approach to sustaining peace and to stabilising democracy has been proven not to be the most immediate means of securing a transition to democracy, as is exemplified by the protracted transitions of Tunisia, Egypt, Libya and the Ivory Coast. It is within this ‘paradox of success’ that transitional justice mechanisms are designed specifically with the aim of guiding the transition of these nations from post-conflict societies into functional democracies. This brings our discussion to its primary focus of justice in Kenya, and how such a focus is connected to the post-Cold War idea of justice and its reliance on transitional justice mechanisms.

As has already been discussed in the earlier review of transitional justice literature, there is continued disagreement as to whether justice should be viewed as a means or as an end (see also Bell, 2009; Haider, 2011; Sriram and Ross, 2007). However, the practical concern here is with the administration of justice *vis-à-vis* its mechanisms or institutions (Balasco, 2013: p.213). While this thesis focuses specifically on the transitional justice mechanisms of the ICC and TJRC in Kenya, constructing a broader and more normative definition of the objectives of transitional justice remains problematic (Gegout, 2013: p.815).

The idea of having transitional justice institutions is strongly connected to the normative assumptions that the post-conflict society needs to confront the past in order to move forward. As such, direct amnesties that hinder criminal prosecutions, or which provide absolute pardon are no longer normatively acceptable. As a result of these liberal cosmopolitan convictions concerning justice, I have observed during my

fieldwork in Kenya that researchers' and policymakers' conception of transitional justice as the idea of coming to terms with past crimes provides them with political and legal opportunities to handle post-election violence in a way that is based on the relatively similar analogy of peculiarity from cases like the Nuremberg trial or Rwandan genocide, which were believed to 'transcend the domain of human affairs' (Arendt, 1958: p.307) The glorification of a 'before-and-after narrative of change' - a particularity of the transitional justice experiment in Kenya - confirms the international, teleological view of justice, in that it is generally believed that after the presidential electoral crisis, Kenya will necessarily find itself in a better situation. This also suggests that such a teleological view of justice can be loosely connected to John Rawl's *Theory of Justice* (1971);

What justifies a conception of justice is not its being true to an order antecedent and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realisation that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine to us (p.510).

However, few have normatively and analytically investigated whether the Rawlsian assumption that justice equals fairness can be easily accepted to promote the liberal cosmopolitan teleology of transitional justice when such mechanisms as a conditional institution were constructed to achieve 'normal' political transition or progress. As such, commentators like Kora Andrieu (2014) have confirmed that, while liberal political writers have cited John Rawl's writings—which have controversially inspired Francis Fukuyama's perverse views of liberal democracy as marking the end of history—in order to convince others that liberalism is a dominant institutional ideology, few have made empirical observations to the contrary, such as the fact that the Libyan National Transitional Council opted for Islamic law in the post-Gaddafi constitution. The Muslim Brotherhood's victory in Egypt's first election, and the

renewed idea of neo-imperialism in rejection of the ICC's jurisdiction in Kenya have become powerful indicators that challenge the normative argument concerning the idea of justice based on liberal political institutions in international thought and practice (p.85).

Specifically, as this thesis demonstrates, the retrospective analysis of the local activities of the TJRC and the international predisposition to normalising the rules of law through the ICC in Kenya have confirmed the Rawlsian notion that justice 'does not answer the question of how to construct a just punitive system' (Lang, 2008: p.22). To simply suggest, like Teitel (2008), that the primary objective of transitional justice is to install a Western notion of justice, enforces the erroneous assumptions of the positivist, legalist approach to power and ideology in post-conflict societies, which will be discussed in the final part of this chapter. Furthermore, drawing from the conclusions reached in both Chapter 4 and 5, I will elaborate in the final concluding remarks of my thesis (Chapter 6) that the differences between the local and international understandings of justice not only constitutes a philosophical obstacle to advancing the Rawlsian idea of administering justice in order to exact a just punishment, but also realistically undermines transitional justice's means of promoting a liberal democratic society. These differences also inhibit transitional justice's ability to reintegrate former antagonists in more neutral and peaceful spaces, or to re-create diverse imagined political communities that are open to the idea of an overlapping consensus or the plurality of political reason in public space. As will also be discussed in Chapter 6, in addition to the fact that both mechanisms are underpinned by the shared philosophical ideas of retribution and restoration, both mechanisms share the ability to interact with the local power dynamics in Kenya. This

constitutes part of the ideological apparatus of post-conflict peacebuilding, and the way that both mechanisms interact with the IDPs has made transitional justice instruments subject to a wider misperception among members of the public. Many members of the Kenyan politician seem to believe that they must choose between retribution (embodied by the ICC's proceedings) or restoration (embodied by the TJRC). The Kenyan politicians believe that either forgiveness or punishment can be granted in the aftermath of the crisis. This dichotomy between retribution and restoration has resulted in the notion of justice being subjected to a form of political compromise.

While research on transitional justice has expanded our understanding of the various contested functions of its mechanisms with regard to democratisation, peacebuilding and development, there is an overarching theme surrounding the placement of transitional justice in Kenya and Africa generally. This theme is of '...an application of justice for political change, and includes not only juridical answers to past repressions, but also restorative, administrative and economic measures' (Subotic, 2014: p.128). The hybrid features and multiple enunciations of transitional justice mechanisms that have recently appeared are designed with the specific purpose of managing transitions from post-conflict democracies. Elections disputes in Africa and popular uprisings in the Arab world differ slightly from the clearer regime changes that occurred in post-authoritarian experiments in Latin America, as well as in the post-communist transitions of Eastern Europe.

My observations of transitional justice institutions in Kenya have confirmed my understanding of the increasing attempts to normalise the application of its concepts

and institutions of firstly within a context without a clear regime change, which tends to result in a horizontal expansion of transitional justice. Specifically, transitional justice tools are no longer relevant, as they are perceived as merely facilitating tools of political transition. However, they can be diversely applied in various contested settings, especially in that of reforming the state, guiding the deconstruction of its undemocratic political institutions and its transition from being conterminous with violence to being defined by a more peaceful order.

Secondly, the application of the field is not fully dominated by the state actor alone, but moves instead in a direction that allows for vertical expansion. This is particularly true in relation to how various agents below the state (including residents of the IDP camps) are perceived as being particularly relevant in determining the direction or the legitimacy of the transitional justice institutions.

In concluding my final remarks, Chapter 6 will include a reminder of the dangers of expanding the contested field of transitional justice. It is important that we differentiate our analysis of transitional justice functions in liberal political transitions from possible situations in which no liberal political transition takes place, such as in Kenya. An examination of the latter case requires a more nuanced level of attention in order to help researchers and commentators to explain why the majority of the ruling class remains opposed to credible transitional justice mechanisms. This is also important in helping to explain why it is important for civil society to play an active role in reducing the influence of state actors, and how the perspectives of the IDPs provide instructive lessons for international interventionists in terms of the ‘distance’ of transitional justice mechanisms from the victims. This latter point is of especial

significance when considering that the ICC initially seemed to be a necessity, and much more legitimate than the country's poor judicial system and entrenched culture of impunity. Consequently, Chapter 3 discusses the political and economic context of Kenya's crisis and reveals the ongoing struggle between accountability and impunity in implementing the specific form of transitional justice mechanism concerned.

However, it is imperative in the next part of our discussion to briefly conceptualise the terms 'accountability' and 'impunity' in order to set a backdrop against which to localise the idea of justice and transitional justice mechanisms discussed above. This conceptualisation is also important to assessing transitional justice as a form of accountability in Kenya. With such an understanding of justice and reconciliation in mind, the next section provides a proposal for understanding transitional justice as an accountability mechanism.

D) Political Reconciliation through Transitional justice: Debating Accountability and Impunity in Kenya

Having operationalised the key idea of justice and the focus of transitional justice in Kenya, it is important to elucidate the contextual understanding of transitional justice mechanisms installed in the aftermath of the 2008 presidential election crisis within the predominant theme that has dominated Kenyan politics for the past 20 years: accountability and impunity through multiparty democracies. Drawing from political and legal literatures, this section opens with an attempt to explain how accountability and impunity in the literature of Kenyan politics have been broadly understood. It then conducts an exploration of how such political struggles between accountability and impunity have been reduced in the past twenty years through a discourse of

electoral democracies and reforms, which unfortunately remain theoretically insufficient to enhance the effectiveness of the concept of accountability.

Secondly, I will briefly suggest how the post-election violence should be viewed as a constituent moment in renewing the whole idea of accountability and transforming it into a specific concrete agenda for criminal accountability through the ICC's proceedings in particular.

In the final part, I shall conclude that, despite the good intention of building a more robust, positive conception of international justice as part of the attempt to localise global transitional justice enterprises in mitigating the Kenyan crisis, it conceals a darker side to international justice. This negative aspect of transitional justice is represented by the predominant role of the local elite in politicising the ICC's proceedings. While the crisis has inspired this thesis to attempt to capture the international policymaker's determination (the ICC's Chief Prosecutor) to expand the notion of accountability through the ICC's proceedings in Kenya, the good political and normative intentions of expanding the concept ignores the structural international reality that conditioned the comparative transitional justice experiments. This reality was defined by many competing international and national political agendas, which diminished the sense of connection with the transitional justice institutions felt by those who suffered directly from the violence itself. This introduces the Critical Legal Studies (CLS) tradition adopted by this thesis to highlight the fact that the key to unveiling the tacit observation of the 'neutral' position of transitional justice implementation in conflict zones lies in understanding the interplay between law and politics. This standpoint is also adopted by CLS in its assessment of post-conflict

peacebuilding and transitional justice projects. The final discussion brings the reader to the conceptual framework proposed in this chapter: power and ideology in Kenyan National Dialogue and Reconciliation (KNDR).

I) Defining Accountability and Impunity

The study of politics has always been preoccupied with the state, the behavior of agents and the agents' accountability to the state. In the literature of political studies, accountability refers to the extent to which government officials are compelled to answer for their actions (Young, 2010). According to Andreas Schedler, the political understanding of accountability comprises two major components: answerability and enforcement (1999: p.13). Schedler argues that 'answerability' refers to the obligation of public officials to explain what they are doing (p.14). Additionally, when informing the public about their public actions, politicians must provide facts in order to explain themselves (p.15). The second component, 'enforcement' refers to the capacity of citizens to impose sanctions on any public official who has violated public trust or laws (p.15). This refers to the collective public ability to reward good or punish bad behaviour through court processes, elections and commissions of inquiry. Such an understanding of accountability is explicitly and implicitly connected to studies that examine the structure of public administration in African public offices (see Okello and Sihanya, 2010; Schedler, 2002; Tshandu and Kariuki, 2010).

As such, the post-election violence has reinvigorated works that examine the practice of accountability and impunity in state-society relations (Kanyinga, 2011: p.100). In Kenya, accountability 'means the end of the political elite's impunity in matters of corruption, violations of human rights, and the encouragement of political violence'

(Mwangi and Holmquist, 2012: p.55). As will be discussed in the next Chapter 3, the recurring episodes of violence indicate the rudimentary features of impunity, which was a crucial element of the ruling class' strategy for subduing democratic struggles in the 1990s. Such an understanding of impunity among local milieu can also be connected to the international understanding of impunity. To borrow Dianne Orentlicher's definition, impunity means:

The impossibility, de jure or de facto, of bringing the perpetrators of violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims (2005: p.14).

Since campaigners for democracy and human rights in Kenya have been preoccupied with challenging leaders and holding them accountable, the agenda for administering justice to victims of post-election violence has endowed the struggle against political impunity with a new sense of urgency. Consequently, the fourth item of the KNDR agenda contributed to the Kenyan public's increasing awareness of the need to address impunity by attributing accountability to perpetrators of electoral violence (Kanyinga, 2012: p.23).

The notion of accountability here—in terms of enforcement and answerability—can be identified as political accountability, which features predominantly in studies of political parties, elections, the greater separation of powers and institutional reform. The danger lies in the fact that, since the political dispensation of the 1990s, liberalisation in Kenya has been regarded as a mere form of procedural democracy that focuses solely on elections, rather than on the substantive process of attributing accountability to leaders (p.32).

In reality, the question of whether leaders can be held accountable by virtue of having being elected is structurally problematic, in terms of vertical and horizontal accountability. Under the old constitutional system (1963-2010), the president's political party controlled parliament and elected judges. Indeed, during the *de-jure* single party period (1982-1992) neither the president, nor the cabinet, nor the MPs were accountable for their actions (Nasong'o, 2007: p.20). As a result, the legacy of the single-party system obscured the distinction between state and society even after the return of multiparty elections in 1992, in which the public were not encouraged to hold leaders accountable. Moreover, the idea of holding Kenyan leaders accountable by virtue of having been elected was largely driven by the international threat of aid sanctions, as 'there were no true domestic political advances between the 1992 elections and November 1997. The government neither made nor allowed any steps...other than holding by-elections as required [by the donor]' (Brown, 2001: p.732). This has arguably diminished the public's trust in the capability of elections to render leaders accountable for their actions, and has augmented their understandable fear that political tensions will degenerate into violence. Indeed, the solitary use of elections to determine accountability is limited, in that when 'incumbents have been dreamed to abuse the electoral system to their own advantage, it has proved relatively easy to manipulate results despite observers and commissions' (Baker, 2000: pp.203-04).

II) Transitional Justice Institutions as an Accountability Mechanism

However, as has been discussed, answerability and enforcement are the most important factors in attributing accountability, and in ensuring that citizens are willing and able to sanction elected officials. This plays an imperative role in the debate

concerning the plausibility of expanding concepts of accountability, so that they transcend the procedural debate on electoral democracy.

In order to be effective, the process of instituting a measure that holds Kenyan leaders accountable for their actions must be a continuous, everyday process, in which politicians are constantly subject to ‘answerability’ and possible ‘enforcement’ (interview with IDP no. 28, Nairobi, March 8, 2012). As one of the Kenyan politicians admitted, the daily discussion of criminal accountability that has been occurring since the post-election violence has reinvigorated public interest in allocating accountability by means of the ICC and TJRC (interview with a local MP no. 2, Rift Valley, March 14, 2012). Arguably, the idea that the process of establishing political accountability can be expanded to include criminal accountability has become increasingly relevant since the post-election violence (interview with Kenyan government officer, no. 1, Nairobi, March 17, 2012).

Discussions about crime, punishment and responsibility have also invoked a philosophical distinction between responsibility and accountability in criminal justice. For instance, Douglas Husak, in his observation on the limitations of criminal law, refused ‘to exaggerate the linguistic games between two words’, since both refer to the same practical function of criminal justice (2007: p.72). Hence, what Schedler identifies as the element of answerability in political accountability is arguably present in the same understandings of accountability and responsibility to be found in the criminology literature. Indeed, the only difference is that when answerability is imposed by criminal justice apparatus, this affects the extent to which such apparatus is perceived to be impartial by citizens in sanctioning criminal acts for which the

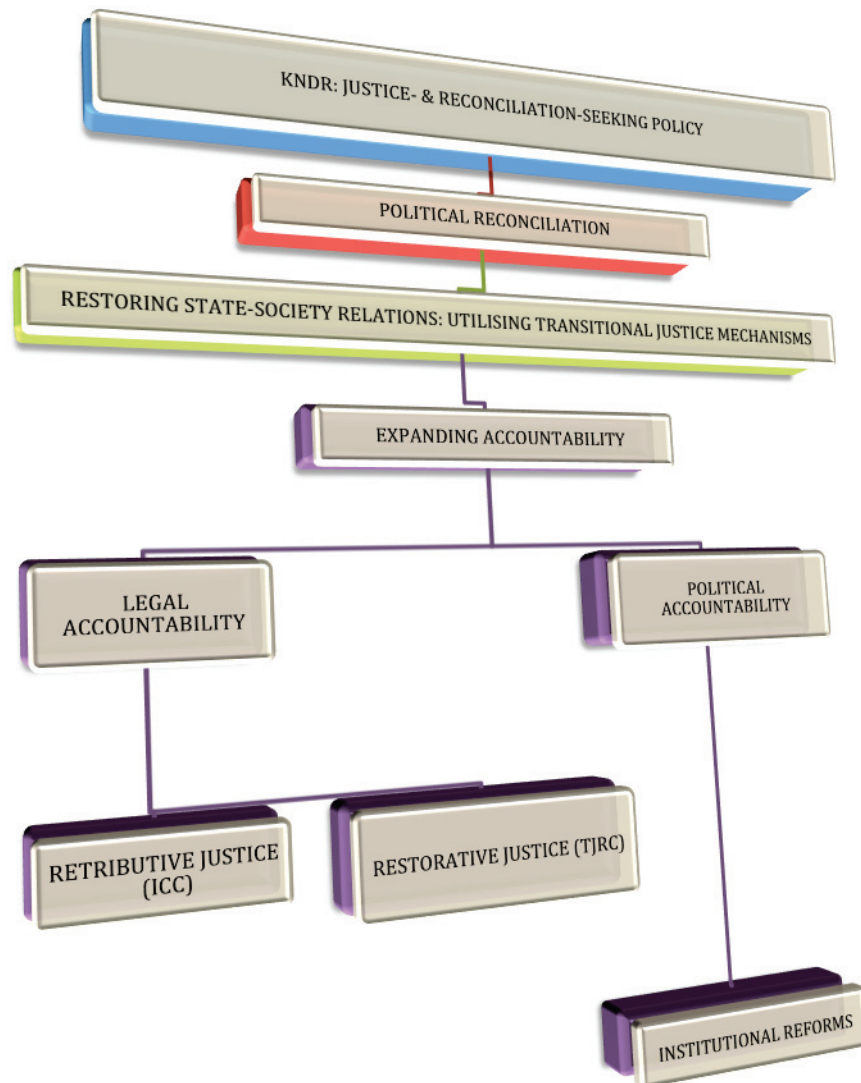
elected individuals are responsible.

As such, Husak reaches a similar conclusion to that of another criminal law commentator, Anthony Duff (2007). For Duff, a distinction must be made between political and criminal responsibility. By his reckoning, the former refers to the civic responsibility of the citizens to monitor the actions of the elected individual by making democratic decisions about election regulations, leadership ethics and the constitution (p.15). The latter refers to the more specific legal responsibilities of the accepted juridical authority to enforce civic and criminal regulations in order to govern the behavior of elected leaders behaviors, ensuring that they do not stray beyond the parameters of criminal justice by taking part in corruption and the pervasion of justice. While Duff's conception of criminal responsibility may seem fairly acceptable, John Gardner has challenged his non-analytical assumptions about responsibility in respect to the administration of global criminal justice (2011: p.88). Gardner's observations of recent international criminal justice stressed the importance of distinguishing between responsibility and accountability in their roles in political or criminal law (p.97). For Gardner, responsibility refers to the usage of the term prior to the violation of law or perpetration of crime, and is manifested by the responsibility of the state and the individual to uphold laws. However, it is only the violation of these laws, by the state or the individual, that necessitates the attributing of criminal accountability. In other words, criminal responsibility emphasises the actor's responsibility to observe the rule of law in order to prevent conflict, whereas criminal accountability is concerned with imposing criminal sanctions and legal punishment through juridical apparatus after the crime has been committed.

The proliferation of scholarly discussion on post-Cold War human rights laws, humanitarian machinery and various interim and permanent criminal institutions constitutes a critical switch in focus from criminal responsibility to criminal accountability. Regardless of Duff and Gardner's position on the distinction between responsibility and accountability, in terms of their roles both before and after the perpetration of criminal acts, they are fairly similar to Schedler's two components of political accountability: answerability and sanction. In this respect, recognising the distinction between criminal responsibility and criminal accountability provides a more precise and analytical conception of the term 'accountability' used by this thesis; what are politically understood by Schedler as answerability and sanction can be connected to what criminal law scholars regard as justice before (responsibility by virtue of being answerable) and after (accountability imposed by sanction or punishment) the violation in question.

As such, commentators such as Raimond Gaita (2011: p.137) and William Schabas (2008b: p.265) have called for both legal and political scholars to recognise the political nature of crimes like genocide and crimes against humanity. This also means that the process of formulating a specific transitional justice mechanism has to be connected to the idea of accountability. In this respect, the two transitional justice mechanisms (the ICC and TJRC) serve to impose a greater degree of political, as well as criminal accountability (see Figure 2.4).

Figure 2.4: Expanding Accountability through transitional justice Mechanisms



Source: created by the author.

However, this requires an understanding of transitional justice as a political project, since transitional justice mechanisms themselves have been widely applauded for being effective devices for resolving conflict and for rebuilding war-torn societies in Africa (Mbugua, 2008: pp.3-9). Exploring transitional justice as politics requires some creative thinking about what justice means to Kenyans, and how can it affect the

transition from violence to peace.

In reaching an understanding of the relationship between transitional justice and accountability, it is best to begin by examining what is commonly understood as the politics of justice during the transitional period (Sooka, 2009: p.24). However, the political nature of transitional justice remains under-theorized, and this has resulted in the failure of legal positivist writings to recognize its political dimensions.⁵⁶ In such instances, while the NGOs produced bundles of ‘how-to’ reports on transitional justice, the political dynamics that shaped Kenya’s justice-and reconciliation-seeking policy remain unaddressed (Vinjamuri and Snyder, 2004: p.353). The reality is that a political understanding of justice had always been maintained during the negotiation of the KNDR agreement, which helped to incorporate transitional justice into the peacebuilding agenda (interview with AU officer no. 1, Addis Ababa, April 14, 2012).

The argument, then, is that the process of constructing accountability can be expanded to include the criminal accountability that it is necessary to impose in the wake of the post-election violence. Rather than simply relying on the election process, the study argues that both components of accountability—answerability and enforcement—could and should be the crucial factors in expanding the discourse on accountability to include the transitional justice measures (the ICC and TJRC). While Robert Pastor describes the influence of groups such as the INGO (whose observations of the

⁵⁶ The limitations of legal measures in addressing past atrocities are owing simply to their legal characteristics, especially in terms of trial. Despite the strong features of retributive justice that have appeared since the trials of Nuremberg, the preference for prosecution may not be as effective as it was originally hoped to be. The lessons that have been learned from Rwanda and Sierra Leone have led to calls for a hybrid response to past atrocities. A political understanding of justice is the first step towards broadening the general understanding of transitional justice. See Drumbl, 2007.

election processes are centered on the third dimension of accountability), the study further argues that the presence of international actors like the ICC is necessary to facilitating accountability measures.⁵⁷ Hence, the international dimension of accountability for mass atrocities, can be considered as the ‘third dimension of accountability’ (see Human Rights Watch, 2009).

In theory, this dimension is arguably missing from the Kenyan public’s understanding of the justice- and reconciliation-seeking processes currently being implemented (Human Rights Watch, 2011: p.46). The projection of accountability through transitional justice mechanisms is not only limited to criminal prosecution, but also affects non-judicial measures, such as the TJRC. Gary Bass argues that the international dimension of accountability can be categorized as either political or legal, national or individual (2001: p.252). He further explains that there is an increasing focus on individual legal accountability for political action undertaken on behalf of the state (p.253).

Indeed, the idea of political immunity, in which state leaders are shielded by the ‘Act of State Doctrine’,⁵⁸ does not accord with international criminal laws.⁵⁸ As has already been shown, accountability consists of two main components: answerability and enforcement. Consequently, the process of developing transitional justice as an accountability mechanism must include both. ‘Answerability’ refers to the ability of

⁵⁷ The third dimension of accountability refers to the active engagement of the transnational actors. The author has borrowed this concept and used it to expand the idea of accountability to include the implementation of transitional justice in Kenya. See Pastor, 1999.

⁵⁸ The ‘Act of State Doctrine’ is part of the diplomatic convention that emerged in the 17th century. It is based on the principle of equal sovereignty, in which the state is obliged to respect the independence of other states, and a jurisdiction of one state is not applicable to other states. However, from the perspective of international customary and treaty laws, this doctrine is no longer relevant if the state leaders invoke immunity after the violation of international laws. For a lengthy discussion on this matter, see Foakes, 2011.

the ruling class to justify the adoption of a particular transitional justice mechanism; ‘enforcement’ refers to the ability of the public to enforce laws or sanctions on any leader who violates the law. This qualifies the public’s ability to challenge political leaders in court.

The criminal proceeding that was enacted by the ICC should also be viewed as being a form of law enforcement in its prosecution of elected officials accused of being directly involved in post-election violence. Such a theoretical discussion of transitional justice as form of accountability clearly indicates that transitional justice is the result of the fusing of political consensus and legal considerations, and occurs as a result of a peace agreement for ending violence. Hence, transitional justice is not solely concerned with implementing a legal mechanism; it is also a political project that deals with past atrocities by applying the best measures for attributing accountability from a local perspective.

Viewing transitional justice as a form of accountability is consistent with the schematics of justice suggested by the former chief prosecutor of the ICC, Louis Moreno Ocampo (ICC., 2009). In his media press conference at the opening of the ICC’s investigation in Kenya, he stated that the ICC would focus on the criminal prosecution of the masterminds behind the violence. The second level of justice that would be administered by the special domestic tribunal would focus on the mid- and small-scale perpetrators who cannot be tried under the Rome Statute. Finally, the third level of justice would focus on the efforts of the TJRC to administer restorative justice and satisfy the victims’ needs for reparation. Although pursuing the above theoretical discussion might advance our understanding of transitional justice and accountability,

the greater dilemma lies in accounting for the behavior of the ruling class and its response to transitional justice. Exploring transitional justice as politics helps to illuminate the positive and negative aspects of politics that transitional justice represents.

III) Exploring the Limits of Transitional Justice Experiments in Africa: The Critical Turn

Given the importance of politics in defining transitional justice mechanism as form of accountability, it is important to examine the positive and negative aspects of the politics of transitional justice. The positive aspects of transitional justice politics are represented by its use of the liberal peacebuilding idea of rebuilding post-conflict societies. One of the liberal cosmopolitan beliefs upon which transitional justice is founded is that the state has a particular responsibility to protect the individual human being and give them the protection of human security, human rights and humanitarian laws. Without dismissing the positive aspects of transitional justice politics, the practice of transitional justice in Kenya and many African countries (as discussed below) has become a political instrument with which the elite attempt to secure legitimacy rather than address the victims' needs for justice (Southall Consultation, 2012: p.7). Indeed, the shift in preference from the original argument for criminal accountability (as attributed by the ICC) to the restorative justice approach of the TJRC has reinforced the public impression that there is no such thing as 'justice' (interview with a retired judge no. 1, Mombasa, February 21, 2012).

The proliferation of studies on post-conflict reconstruction exemplifies the tendency of transitional justice scholarship to focus too heavily on the legal measures it adopts

and the moral values that it represents. There is thus a growing body of literature that calls for an assessment of the political nature of the tsarina justice experiment. Phil Clark's study of the *Gacaca* court concludes with a reminder of the complexity of reading transitional justice as a 'discreet legal process' in post-genocide Rwanda, and calls for transitional justice commentators to recognise a 'wider political contingency, cultural diffusion and historical legacy that requires a legal pluralism and more flexible methodology in interpreting and critiquing the process' (2011b: p.27). Meanwhile, Tim Allen's observations of the ICC's indictment of Lord Resistance Army (LRA) warlords highlight the difficult task of the implementation of international arrest warrants in Northern Uganda. Allen also exposes fallibility of legal positivism's denial of the crucial elements of 'ownership' and 'victim's perspective' (2008: p.15). There are echoes of these critical observations in Tim Kelsall's sociological analysis of the Special Court for Sierra Leone, in which he likens the court's artificial character and modus operandi to the act of driving a 'Mercedes Bens in the middle of a rural road full of potholes' (2009: p.261). Studies of transitional justice institutions in Timor Leste, Cambodia and South Africa have also highlighted the predominant legal perspective adopted by positivist legal commentators, which posits that the popular associations of grandeur attached to these operations by the legacy of the Nuremberg and Tokyo trials hinders the process of addressing victims' needs for retributive justice. This has also resulted in the general failure of these operations to recognise the victims' practical and immediate needs for material compensation, reparation and livelihood (Powell, 2010: p.245; Stanley, 2008: p.180; Stensrud, 2009: pp.13-14).

Daniel Branch concludes his preliminary observations of the ongoing ICC and

TJRC's proceedings in Kenya by suggesting that they are more concerned with politics than justice (Branch, 2012). Furthermore, in the author's interviews with various individuals involved in the TJRC hearing sessions, many criticised the 'dramatic and performative aspects of transitional justice', and its failure to address the actual grievances of the victims (interview with IDP no. 29, Nairobi, March 8, 2012). With emotions running high, the media reports of the hearing sessions focused largely on the divisive political blame game being played by members of the ruling class, which only indicated their *prima facie* intentions to interfere with the hearings by requesting a legal injunction to stop the TJRC operations. This is a prime example of the persistent role of impunity in hindering the process of attributing accountability (interview with TJRC officer no. 3, Nairobi, February 6, 2012).

In all the aforementioned works of transitional justice literature, commentators and former transitional justice policymakers have expressed their concerns about the tendency of current studies to focus on questions of whether the post-conflict experiment is legal or not, and whether it can be located within a dominant narrative of TJ that began with the post-1945 tribunals. Many of these critical perspectives confirm two major conclusions reached by Mark Drumbl, a former defense attorney in various trials at the International Criminal Tribunal for Rwanda (ICTR) (Drumbl, 2007: p.61).

Firstly, an increase in the number of international tribunals provoked a greater degree of critical focus on the retributive logic of punishment through the discourse of legalism and criminal violations (p.121). Secondly, the fact that the proceedings of the international tribunal have been romanticised by legal positivists and transnational

human rights advocates has resulted in there being a lack of recognition of the local ownership of the processes, and their connection to the victims themselves (p. 121). As such, transitional justice continued the polemic of human rights initiated by Harri Englund's ethnographical evidence compiled in Malawi. By using a bottom-up approach that avoids focusing exclusively on the national elite, he suggests that the ideas of freedom and rights appear to impede the individual and communal struggle against poverty and injustice (2006: p.13). Instead of liberating the individual from oppressive power structures and their histories of violation, the international commitment to democratic citizenship and human rights in emerging democracies through the acceptance of foreign aid and the adoption of procedural democracy has repeated the technocratic mistakes of the problem solving approach adopted in econometric developmental studies and structural adjustments policy (p.17).

As a result, subaltern agents who exist outside of the radar of the national elite invoke the abstract ideas of rights and justice in order to distinguish their genuine commitment to these ideas from the elite's payment of lip service to liberal values. These individuals demonstrate their commitment to rights and justice by struggling for their rights in harsh economic conditions, and remaining subject to the rule of power structures. This is identified and discussed in the next section as the act of everyday resistance against the ruling class and foreign elites. Hence, while Tony Lang observes that the increasingly punitive nature of international justice produces more illiberal orders, and suggests that the juridical structure—as imposed by global constitutional reforms—may provide a more pragmatic means of reducing the structural tendency towards anarchy at the international scale (Lang, 2008: pp.130-145), this thesis suggests that such a global juridical structure must also recognise the

real danger of over-emphasising the legalistic nature of tribunals or transitional justice in dealing with mass atrocities, as well as the liberal values that they represent (see Clark, 2010).

The fact that some African leaders invoked the language of human rights and exhibited impunity in challenging the legitimacy of the ICC's intervention and its geographical imbalance in Africa only confirms the validity of Arlene Tickner's question: 'how well does IR [theory and practice] travel to other [non-western] regions?' (2009: p.329). Two immediate responses should be highlighted here; firstly, the invocation of a liberal language of rights and justice by African ruling elites has confirmed their legitimate disconnection from the victims. This is particularly true of when these leaders challenged the ICC's jurisdiction and impeded the criminal prosecution of some of the big fish; it is also manifest in the opposition of the AU leaders to the ICC's intervention in Sudan, Kenya and Libya (see Brown and Sriram., 2012; Lynch and Zgonec-Rozej, 2013; Waddell and Clark, 2008).

Secondly, while the ICC have re-affirmed their commitment to combatting impunity and have questioned the AU's political rhetoric of peace and justice, they have still failed to address atrocities committed by superpowers in other regions. Furthermore, they have acted on some erroneous assumptions and relied heavily on legalist discourse; this has provoked accusations that ICC's commitment to victims extends only to prosecuting the national elite, but not to imposing measures to help them at a sub-national level by diminishing the power of the oppressive structures of post-conflict regimes (see Ford, 2009; Glasius, 2008; Plessis, 2010a; Waddell and Clark, 2008).

In the words of Thomson and Nagy, ‘legalism has failed’ to address the issue of power disparities in oppressive post-conflict environments (2011: p.30). Indeed, William Schabas had previously warned against the erroneous, institutionalist assumption that the ICC would meet unrealistic expectations in instituting reforms. To Schabas, fairness in the administration of the ICC cannot simply be ensured by implementing structural, institutional reforms, or by reducing the UNSC’s intervention in referring a case to the court (2008a: p.195). Dealing with the atrocities committed by leaders of rough states cannot be counted as part of the ICC’s success story if the prosecutor continually dismisses the atrocities committed by permanent members of the UNSC as a result of legality errors (p.196).

In such instances, rather than romanticising the legal mechanisms, institutional reforms or the liberal cosmopolitan values that transitional justice represents, perhaps Cristian Bell’s innovative approach in contextualising transitional justice may lead to a greater recognition of politics in the debate surrounding it, thus providing a more fruitful understanding of its ambiguous role (see Bell, 2009). ‘What informed transitional justice as a field of knowledge [theory] and practice?’ (p.4). Bell argues that, as a field of theory, transitional justice was informed by the competition between various normative ideas; for instance, the debates between peace and justice, international and national politics, retribution and restoration, and law and politics (p.4). Simultaneously, however, as a form of policy of intervention, transitional justice enforces a dominant narrative of liberal peace; it offers a westernised notion of justice and a one-size-fits-all package for justice- and reconciliation-seeking policy for most crises that have occurred in non-western societies (p.4).

Even in countries that are geographically located within the European domain (such as the Balkans and Northern Ireland), the transitional justice prescriptions issued by external mediators have not easily being accepted by the locals (Duffy, 2010: p.45; Peskin, 2011: p.73). Having emerged in the 1990s, by 2001 the field had become more distinct; a liberal cosmopolitan approach began to be adopted, which provided a normative language of human rights and humanitarian intervention with which to pursue justice, and to apply transitional politics (Bell, 2009: p.5). However, the normative justification for human rights and humanitarian laws is not impartial, and does not address the substantive issue of which type of justice (retributive or restorative) should be implemented, and who is to decide on its execution (Thomson and Nagy, 2011: pp.28-30).

As such, according to Bell, '[t]ransitional justice does not constitute a coherent field but is rather a label or cloak that aims to rationalise a set of *diverse bargains* [emphasis added] in relation to the past as an integrated endeavour.' (Bell, 2009: p.6)

Bell identifies these diverse bargains as belonging to three distinct projects:

- I. Continuing the struggle against impunity, wherein transitional justice is understood as being a legal measure for addressing past violations of human rights;
- II. introducing a set of conflict resolution techniques that involve the formulation of justice measures as a means of pressuring conflicting parties to return to the negotiation table;
- III. creating a standardised instrument for intervention under the multi-layered cloaks of international state building, human security, and R2P (pp.7-8).

Although these diverse bargains are distinct from each other, they appear together as one package (transitional justice discourses) created with the help of international assistance in dealing with regime changes (Teitel, 2000: p.6). By romanticising the nature of transitional politics, the new regime that emerged during the transition perceived these diverse projects as tools (in the form of transitional justice) with which to elicit recognition of their legitimacy and gain assistance (in the form of liberal peacebuilding) from the international society (Garcia-Godos and Sriram, 2013: p.5). This regime claimed to be “a new regime” for managing post-conflict society.

The striking similarity between Kenya’s transitional justice following the post-election violence, the formation of the Special Tribunal for Lebanon (STL) after the assassination of Rafic Hariri and the operations of the Extraordinary Chambers in the Court of Cambodia (ECCC) after power-sharing government in Cambodia support the evidence that, while these countries have undergone unclear transitions (since many of the accused suspects remained protected by the incumbent regimes), their “new regimes” declared themselves by appealing for international assistance. By adopting a particular transitional justice mechanism, the new regime invoked the authority of transitional norms as a way of communicating to the international society that they intended to uphold human rights laws and other international principles.

The adoption of transitional justice policy (through KNDR, in the case of Kenya) was the mechanism with which the regime reinvented itself as a “new regime” entity, and convinced international society that it was committed to upholding liberal democratic values, political reforms and governance. As a retired justice in Kenya confirmed:

The establishment of the GNU with its transitional justice agenda is solely dedicated to continuing the legacy of 'grand corruption'... obviously it was formed because none of the ruling class predicted that they would be in positions of diminished status after the post-election violence. To be accountable for another Rwanda [the 1994's genocide] will be risky to their powers and neo-patrimonial interests. The best that can be done is to ask for international assistance in stabilising the state (interview with a retired judge no. 2, Mombasa, March 15, 2012).

In this respect, the judge reminds us of the fact that the crisis occurred and transitional justice was established within the confinement 'of the post-colonial African state, since those who occupied the state never succeeded in building a local hegemony, and relied heavily on international recognition' (interview with a retired judge no. 2, Mombasa, Kenya, March 15, 2012). After the crisis, they later abandoned the prospect of international assistance and reverted to their old mode of governance, which was dependent on the illegal use of violence and neo-patrimonial practice (Cheeseman and Tendi, 2010: p.225-26).

The invocation of transitional justice by the GNU can be interpreted as the process of reinventing a new legitimacy, since the country nearly collapsed following the post-election violence. The acceptance of offers of international assistance and the promise to maintain respect for human rights was just another window dressing manoeuvre with which the weakened members of the ruling class reinforced their positions through the establishment of the GNU (Cheeseman, 2011; Kagwe, 2010; Murunga and Nasong'o, 2006; Mwangi and Holmquist, 2012; Nasong'o and Murunga, 2007). In parallel, Ian Taylor argues that the *modus operandi* of African rulers 'are expressed through both the threat and actual use of violence and the immediate disbursal of material benefits... Without these twin strategies—both inimical to long-term development and stability—the African ruling elites cannot rule' (2007: p.558).

The current perception in Kenya of the illegitimacy of the elite, and the fact that this elite depended on international assistance to negotiate power-sharing agreements during the crisis naturally affects the long-term function of transitional justice (Brown, 2013: p.239). As such, transitional justice should be viewed as the process of negotiation, and the attempt to legitimise new forms of power and political order. Transitional justice is not an objective process, and is never legally executed in response to past atrocities committed during the post-election violence. Rather, it is a means of negotiating a complex political scenario, which cannot be summarised vaguely as a moral conflict between good and evil.

To set it alongside Friedrich Nietzsche's maxim of 'beyond good and evil' (see Nietzsche, 2003), transitional justice should not be approached as a dogmatic scheme laden with morals, as it is envisaged by liberal cosmopolitanism. In *On the Genealogy of Morals*, Nietzsche criticises the personification of societal morals based on the monolithic allegories of good for the strong and bad for the weak (2008: p.57). To romanticise the rule of law is to neglect the essential characters of power; to depoliticise transitional justice is to repeat international peacebuilding's mistake of negotiating transitional space through the empty vessel of the state (see also Richmond, 2011b).

Perhaps the ethnographical research of Susan Thomson in Rwanda (2013) and Claire Moon's discourse analysis on the TRC's final report in South Africa (2008) can be said to have provided a more specific location of politics in transitional justice processes in specific terms of power and ideology. Drawing from Foucault's works on power and Althusser's readings of ideology, both Thomson and Moon illuminated the

power relations and ideological apparatus behind the transitional justice mechanisms implemented in both case studies.

Any attempt to exclude power and ideology results in the implementation of justice measures that are alien to these post-conflict societies (Cole, 2007: p.186). In Rwanda, the discourse of legalism through the language of TJ has ignored the reality of how the state ‘employs disciplinary tactics [transitional justice] to make Rwandans behave in ways they might not themselves choose...’ (Thomson, 2013: p.10). In South Africa, the TRC’s final reports betrayed the victims, as the selective testimonials were politically utilised as forms of state apparatus for justifying the positions of the new, post-Apartheid ruling class through a vague ideology of reconciliation. The final reports also suppressed the grievances of certain victims when their narration of such grievances was deemed to be a threat to the African National Congress (ANC)’s vision of reconciliation (Moon, 2008: p.148).

In Cambodia, the operations of the ECCC and its disconnection from the survivors of the Pol Pot regime indicated that the ECCC was also being used as a form of ideological apparatus by the incumbent government in maintaining its power and authority (Elander, 2012: p.113). ‘Why have a tribunal in 2006 when many of the survivors are already dead?’ (interview with ECCC observer no. 3, Paris, November 29, 2010). ‘Maybe we should have asked why old wounds were being re-opened by the tribunal, when the 1997 power-sharing government lacked credibility in the eyes of voters.’ (interview with a former ECCC observer no. 2, Paris, November 28, 2010). ‘Were such past projects capable of fostering national identity when the incumbent was unwilling to address economic disparities?’ (interview with ECCC observer no.

1, Paris, November 27, 2010).

In Benghazi, the simultaneous foreign authorisation of the ICC's indictments and the UNSC's resolution of a 'No Fly Zone' served to legitimate oppressive modes of governance, in which the transitional council perceived international assistance as a 'license' to assassinate any passive bystander and unarmed civilian that was associated with the former Gaddafi regime (Neethling, 2012: p.38). 'It's ironic that you [international actors] are obsessed with the atrocities of Gaddafi, yet remain silent about the heinous crimes of the transitional authority' (interview with AU officer no. 1, Addis Ababa, April 14, 2012). 'What makes the victorious forces' show trial of Augusto Pinochet and Saddam Hussein different from the more "benevolent" ambitions of the ICC's warranting of Gaddafi and Bashir?' (interview with a local lawyer, Cairo, July 22, 2011).

In this respect, scholars and commentators have confirmed transitional justice mechanisms as being the products of hierarchical relations. They can be identified as forms of ideological apparatus for enacting legitimacy, structured by the existing pattern of neo-patrimonial domination; as international-local bargaining chips for the elite, and as methods of historical exploitation used by those in power, 'in which political leaders see their rights to rule as natural', and the victims are treated as 'objects of manipulation' (Thomson, 2013: p.11).

In the aforementioned case studies, regardless of what position they hold and whether or not they reject violence, ordinary citizens must confirm their positions according to the dominant narratives and power structures imposed by the incumbent regime or

local politicians. For instance, unarmed civilians who belonged to the former Gaddafi regime and who continued to live in Benghazi were deemed to be traitors who deserved the death penalty (Çubukçu, 2013: p.57). Likewise, all Rwandan Hutus are considered to be perpetrators who are collectively guilty for the genocide (Thomson and Nagy, 2011: p.30).

In Kenya, the Kikuyu residents of the IDP camps in Rift Valley are considered to have deserved to have been evicted from their lands and to remain homeless (Kossler, 2008: p.42). This complicates the adoption of the legal taxonomy of perpetrator and victim in locating their positions and in assessing the victims' claims for reparations. The national elite or local politicians' identification of victims from residents of the IDP camps is not always accurate, and does not necessarily reflect the actual position of those IDPs who remained vulnerable or who have no political ties with the non-Kikuyu community, for instance. For that, the liberal cosmopolitan project of transitional justice fails to acknowledge transitional justice's position within a constellation of power and ideology; transitional justice is not only concerned with addressing past abuses of power, but is also part of the political process of enacting a new power through a state apparatus of ideology in order to subdue the victims' demands that leaders be held accountable. Of particular relevance here is Foucault's commentary on Carl von Clausewitz's famous argument: 'power is war, a war continued by other means.' (Foucault, 1997a: p.61). Transitional justice, then, is the personification of this phrase, in that its mechanisms must recognise and 'uphold the disequilibrium of forces that [were] displayed in war'. (p.62). Interpreting transitional justice as a form of power and ideology is crucial to understanding the dynamics of justice- and reconciliation-seeking policy in Kenya.

E – Conceptual Framework: Power and Ideology in Kenyan National Dialogue and Reconciliation

I) Foucault's Method of Power and Knowledge

In examining the transition from public prosecution methods adopted by the absolute monarch to the introduction of the modern prison system, Foucault revealed that the practice of modern justice consists of more than just the technical, administrative role of the judiciary; it also necessitates 'an assessment of normality and a technical prescription for a possible normalization.' (Foucault, 1977: 21) In addition to passing judgement, the court must also identify the most suitable way of rehabilitating former criminals, according to the society's standard of moral imagination (p.22).

By charting the history of punishment and the changes to modes of punishment, Foucault attempts to highlight how certain ideas developed, or how certain discourses became dominant during a specific historical period (p.23). In such instances, transitional justice can be understood as the political process of consolidating the legitimacy of a new regime that emerges during a transition. This understanding has resulted in the projection of transitional justice as a dominant discourse, against which different political agents may be evaluated and disciplined. This discourse also allows these agents to evaluate themselves, and to change their behavior in accordance with the dominant discourses (Fontana and Pasquino, 1984: p.65).

The assessment of conditions within which dominant discourses produces a set of norms (such as the rules of law, humanitarian intervention and human rights) with which agents may exercise power over other agents, as well as over themselves. This

constitutes the bedrock of Foucault's historical inquiry in *Discipline and Punish* (1977).

In a realist understanding, power is understood as the property or attribute of the agent (Hayward and Lukes, 2008: p.7); for instance, actor A's may be able to enforce actor B to do things that are in actor A's interests (Lebow, 2013: p.62). The definition of power, in this sense, is based on the reductionist view that it is the property of the agency: actor A possesses the power to change actor B's behavior so that it accords with the interests of actor A. Foucault introduced a different, 'structural' conception of power, in which it is not reducible to being defined merely as the property of the agent who exerts it (Neal, 2009: p.540). This concept of power has produced 'a constellation of discursive structures, knowledge and practices...which create a set of rules and standards, with reference to which agents may exercise power over other agents, as well as over themselves' (Manokha, 2009: p.430).

Defining power based on Foucault's concept however is fairly problematic. In the first volume of his *History of Sexuality*, he states that, 'power is everywhere; not because it embraces everything, but because it comes from everywhere. And 'Power,' insofar as it is permanent, repetitious, inert, and self-reproducing...' (1998: p.93). One can argue that such a vague conception of power serves to oversimplify one of the most important aspects of the study of politics (Joseph, 2010: p.223). While Foucault conceives power to be omnipresent, he does not attempt to develop a grand theory for it (Death, 2012: p.7). The Foucauldian concept of power should not be understood as a thing (property) whose nature should be questioned; rather, it should be viewed as

the process by which the agent continuously refers other agents and themselves to the dominant discourses.

Rather than asking what power is, Foucault challenges us to examine how power operates. By referring to the dominant discourses, the agents position themselves within a constellation of power relations (Fontana and Pasquino, 1984: p.65). Foucault used the 'archeological method' to illuminate how particular discourses have become dominant, powerful and sustained within a particular historical contingency (2002a: p.152). According to Foucault, the dominant discourses determine the position of the subject/agent within a constellation of power relations (1998: p.73). The dominant discourses manifest themselves in political relations and ideas, which are made visible in the form of policies.

For instance, the field of law produces the dominant discourses for the ideas of crime and punishment, as they are represented by the institutions of courts and prisons (Hammer, 2007: p.98). In Kenya, transitional justice has become the dominant discourse for the idea of accountability, as represented by the institutions of the ICC and the TJRC, as well as by the subjects (the deceased victims and the IDPs). The dominant discourses then determine the political agent's position in the constellation of power.

In *Discipline and Punish*, Foucault describes the two key characteristics of his conception of power. Firstly, he demonstrates that power is not the property of the agent, but a strategy that is employed according to its efficiency (1977: p.26). In other words, the dominant discourses create a standard norm to which the agent can refer

and differ; when the agents interact with each other they will meditate on the dominant view of what is considered as normality (p.26). Secondly, power should not be understood as a form of oppression or domination of other agents (p.27).

Power is both positive and negative in the way in which it produces the behavior (through consent and sanction) with which the agents attempt to conform to what is considered, by the standard of the dominant discourses, to be normal or accepted (p.27). Foucault's disappointment with western Marxism, and the method of historical materialism with which it reduced the analysis of relations to a form of class partition, inspired him to focus on power. 'For Foucault, historical materialism was inadequate in that it split...a division in critical theory between what human beings say and what they do...' (Manokha, 2009: p.433).

The Foucauldian method of historical analysis is known as 'genealogy', a term borrowed from Nietzsche (see Macmillan, 2009). As discussed previously, Foucault used the term 'archeology' to illuminate how certain narratives became the dominant discourses at certain points in history. Hence, it is important to clarify both terms. While the distinction between archeology and genealogy is contested in Foucauldian scholarship, Gavin Kendall and Gary Wickham clarify that archeology can be understood as Foucault's method; 'genealogy is not so much a method, but a way of putting archeology to work, a way of linking it [the archeological examination of the past] to our present concerns' (1999: p.31). Foucault used archeology to examine how certain narratives became dominant within a particular historical contingency, and genealogy to illuminate the discontinuity of the past from the present (see also Moon, 2009).

The use of genealogy here does not suggest that contemporary or present historical development (history as present) is better than previous development (history of the past), but simply serves to highlight the discontinuities between them at any given historical juncture.⁵⁹ For example, during the Cold War (history of the past), the concept of human rights was subject to heavy criticism; not only from the Soviet Union, which saw human rights as an extension of the oppressive features of liberalism and capitalism, but also from the Third World political movement, which believed in collective rights (see also Humphrey and Valverde, 2008). Examples of this advocacy of collective rights are the promotion of ‘Asian values’ in Singapore and ‘African Socialism’ in Ghana.

However, after the demise of the Soviet Union, human rights became more accepted as a liberal cosmopolitan project that served as part of the political agenda for peacebuilding and transitional justice. Accordingly, despite the non-western leaders’ continued criticism of the contemporary practice of human rights, the dispute has now become not so much about the liberal cosmopolitan values it represents (as it was during the Cold War), but more about the practice of human rights and the threat it creates for those in power.⁶⁰

⁵⁹ Unlike the ‘conventional historian’ who views history as a linear progress, Foucault and other Nietzschean historians emphasize the element of discontinuity in historical junctures. They compare the concepts of history of the past and history of the present to signify a historical discontinuity or break. For a lengthy discussion on the concept of history as past and present, see Dean, 1994.

⁶⁰ Since the propagation of liberal democratic values was inevitable following the Cold War, the current critiques on human rights focus more on its practice. For instance, the debate between the adoption of the western style justice versus the adoption of traditional justice in Africa represents the controversy surrounding human rights legal regimes that threatened their power positions, but not so much about the liberal understanding of human rights itself. See An-Na’im and Deng, 1990.

Although both historical periods (the Cold War and the post-Cold War period) can be connected by the way in which international society responded to human rights issues, these issues performed different functions in both historical periods (Manokha, 2009: p.436). In short, genealogy refers to the process of contextualising history from past to present by highlighting the discontinuities in historical breaks:

Contrary to “traditional” historical studies which examine particular events within grand explanatory systems and processes seen as linear evolutions, Nietzschean genealogy seeks to depict the present as finite, limited, even repugnant, simply by locating differences in the past. The Nietzschean historian begins with the present and goes backwards in time until a difference is located (p.436).

Inspired by Nietzsche, Foucault stresses that the ultimate aim of genealogy is:

to spot the uniqueness of events, outside any monotonous finality; to look for them where we would least expect them and in what goes as having no history at all—feelings, love, conscience, instincts; to capture their return, in order not to trace the curve of their slow evolution, but to find different stages at which they played different roles (cited in Manokha, 2009: pp.433-4).

By adopting the Foucauldian, genealogical approach, we can uncover the forms of power to which the agent becomes subject, as well as the object of technologies of power (Foucault, 2002b: p.98). Such an examination of power feeds in to Foucault’s famous discussion of knowledge as it is embodied within the constellation of power relations. He has used the hyphenated term ‘power-knowledge’ to explain that power and knowledge are intertwined, and therefore interdependent: ‘there are no power relations without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations’ (1977: p.27).

By examining the way agents exercise power over others and over themselves, Foucault has suggested that we should be cautious with the projection of knowledge.

For instance, in *Discipline and Punish* Foucault urges his reader to be critical of the invocation of the ‘Enlightenment’ as the age of reason, which is projected by proponents of liberal cosmopolitanism as ‘the historical reason’ for the protection of the human body from severe violations (p.23). Examining the transition from public torture to the birth of the prison system in the eighteenth-century, he determines that this transition in punishment should not be perceived as denoting the better treatment of a human being, but as the configuration of power and its paradigm shift from the authority of the absolute monarch to that of the new, middle-class bureaucrat (p.24). In Foucault’s view, the change in the mode of punishment embodies the production of ‘the new knowledge’ (1984: pp.45-6). While the form of punishment represented by the prison system may seem to be more humane in its focus on the rehabilitation of ‘the soul’ rather than the brutal torture of the body, the prisoner’s body still represents an object of this new knowledge, and a reference point for it. Foucault elaborates on this in his 1978 lecture, *What is Critique?*: ‘The word knowledge [*savoir*] is used to refer to all the procedures and all the effects of knowledge [*connaissance*] that are acceptable at a given moment and in a defined domain’ (Foucault, 1997b: p.394).

To understand Foucault’s discussion on knowledge, we have to consider the two French words for knowledge; *savoir* and *connaissance*. The former refers to quantitative or empirical kinds of knowledge, whereas the latter refers to qualitative or experiential forms of knowledge. The difference between these two is akin to the difference between ‘I know the direction to St. Andrews in Scotland’ (a *savoir* – based on map) versus ‘I know the town very well as I used to live there’ (a *connaissance* – based on experience). In a Foucauldian sense, the body that is subject to punishment is an object that embodies two forms of knowledge (1977: p.27). The

first body of knowledge (*savoir*) refers to the ‘officialized’ knowledge possessed by the public, which is directly connected to the normative justification of punishment as a mode of normalizing the ‘prisoner’s body’ until it is fit to return to society (p.29). The second body represents the soul (*connaissance*) of the new knowledge that is socially constructed by the prison system (p.30). To Foucault, this new constructed knowledge is hidden, and needs to be challenged because it is linked to a societal prescription of truth as the embodiment of knowledge (see Machava, 2011). This truth is never objective and is always accountable for positioning the agent within a constellation of power relations (Foucault, 1977: p.30).

Taking an anti-humanist stance, Foucault explicitly rejects the liberal attempts to romanticise the celebration of human dignity, which can arguably be linked to the critical approach to human rights in assessing transitional justice experiments (see also Golder, 2010). For this, he introduces the term ‘discipline’, the process of making the body ‘docile and able to be ‘utilized’ (after a longer period in prison), so that ‘the new man can be produced’ (Foucault, 1977: p.137). In other words, Foucault uses the historical transition from public prosecution to the prison system as a turning point for the consubstantiality of power with knowledge, where the subject (prisoner) becomes an object that embodies the knowledge of how to discipline society (p.138). The consubstantiality of power with knowledge delineates the distinction between the subject and the object, in that the subject is transformed into a new object of knowledge (*connaissance*). Nevertheless, Foucault’s examination of the modern prison system displays some effective techniques for examining power in transitional justice processes, namely:

- The projection of transitional justice as the dominant discourse of

accountability following post-election violence.

- The idea of pursuing justice through multiple accountability mechanisms in Kenya (the ICC and TJRC), which embody the representation of ‘power-knowledge’.

II) Transitional justice as the Dominant Discourses of Accountability

Following the post-election violence, the public debate on accountability and how to apply it through transitional justice mechanisms was renewed with particular reference to criminal prosecution. This political crisis has established transitional justice as the dominant discourse for accountability. Against this discourse, different political agents may be evaluated and disciplined, while simultaneously evaluating themselves in accordance with transitional justice. One of the victims admitted that:

since 2008, everyone has been talking about transitional justice, especially the politicians. While the idea seems alien to most of the ordinary populace, it has become a ‘hot subject’ in everyday discussions among members of the political class, including those who previously believed that human rights are irrelevant and that none of the suspects would be prosecuted. They cannot escape talking about it (interview with IDP no. 31, Rift Valley, March 14, 2012).

As shall be discussed in Chapter 3, the idea of accountability for the systematic violation of human rights and impunity is not a novel phenomenon in Kenyan politics (Oucho, 2010: p.491). However, while the demands for accountability have been being made since 1992 (for example, through multi-party elections and the establishment of the TJRC in 2003), the post-election violence constituted a critical shift in Kenyan history, and provided a space for the public (especially the victims, members of local civil societies and transnational actors) to implement mechanisms for attributing accountability in the form of transitional justice, particularly through the ICC’s investigations (Waki, 2009: p.18). As the Waki report had recommended a

criminal accountability mechanism, it was assumed that national reconciliation would take the form of retributive justice.

However, agenda item number four of the KNDR agreement broadened the discourses of criminal accountability to include political reforms, constitutional reviews, electoral reforms and the addressing of corruption (Kanyinga, 2012: p.31). Prior to the post-election violence, the history of politics, violence and social processes in Kenya did not make the country suited to institutionalizing accountability through the policy of transitional justice.⁶¹

Tellingly, scholarly writings on Kenyan politics and social history from the past thirty years have centered around three main themes; firstly, that of colonial and post-colonial discussions of the challenges to nation-building processes (for example, see Anderson, 2005; Berman, 1990; Berman and Lonsdale, 1990b; 1990a; Branch et al., 2010; Branch, 2011); secondly, the theme of the political economy of development, dependency theories and structural adjustment policies (for example, see Bates, 2005; Mueller, 1984; Hyden, 1987); finally, the theme of multiparty elections, the role of ethnicity, neo-patrimonial networks, constitutional reforms, the nature of democratisation, the country's position in sub-regional and regional arrangements, and the international dimensions of Kenya (for example, see Branch and Cheeseman,

⁶¹ There is further disagreement within the literature of Kenyan politics, especially on whether the policy of transitional justice began in 2003 or after the 2008 crisis. Given the actual regime change that took place in the aftermath of the 2002 election, the 2003 TJRC task force should be given its due merit, as this was the first time the actual term or concept of transitional justice displayed itself in the contemporary politics of Kenya. Arguably, however, it was only following the crisis in 2008 and the TJRC's first operations in 2009 that state actors, civil society and the IDPs began to engage in serious political discussions concerning transitional justice policy. It was only after the crisis and the commencement of the ICC's proceedings that IDPs and ordinary members of society began to incorporate transnational terms such as 'justice', 'peace' and 'reconciliation' into their everyday language.

2009; Cheeseman, 2009; 2006; Cottrell and Ghai, 2007; Klopp, 2002; Kagwanja, 2003; Kanyinga, 1998; Lynch, 2011b; Nasong'o and Murunga, 2007; Southall, 2005; Throup and Hornsby, 1998).

However, few of these works commit to an extensive engagement with contemporary Kenya from the perspective of transitional justice, or the process of political reconciliation that began following the post-election violence.⁶² In Foucault's genealogical sense, the post-election violence constituted a historical shift, in which the previous struggles and focuses of accountability emerged as a new object of knowledge. This new object was transitional justice as a form of accountability, which has arguably become the dominant discourse subsequent to the events of 2008. Indeed, the process of integrating transitional justice as part of the power-sharing agreement signified the importance of debates concerning accountability in Kenyan politics (interview AU officer no. 1, Addis Ababa, April 14, 2012).

Such dominant discourses have inevitably produced a set of norms and considerations based on those produced by previous post-conflict tribunal and peacebuilding missions, including those of Former Yugoslavia, Rwanda and Sierra Leone. Additionally, human rights practices in the African continent, the ICC's ongoing intervention in African countries, the TRC operations in South Africa and western governments' geostrategic interests in East Africa during the negotiation of the power-sharing deals and during the formulation of transitional justice as part of the KNDR agreement have also contributed to producing this set of norms (interview with an IJR officer, Cape Town, July 15, 2011). Within all these developments,

⁶² Similar sentiments were shared by the Kenyan local academician, see Munene, 2012.

transitional justice has become the dominant discourse of accountability in governing the behavior of various political agents, especially among the senior officials of the GNU.⁶³

By drawing on Foucault's two characteristics of power, we can demonstrate how agents increasingly evaluate themselves and other agents with reference to the process of implementing transitional justice mechanisms in Kenya. As has been discussed, power is not a property that belongs to the agent, but is defined by the dominant view of what is considered acceptable. Additionally, power does not exist as a form of repression, but as both a positive and negative force with which the agent displays behavior that is consistent with the dominant discourses. Even during the absence of sanction (negative force), agents can exercise power over themselves to accord with the dominant discourses.

The process of considering Foucault's two characteristics of power helps to uncover various plausible explanations for the implementation of transitional justice by the Kenyan government. To simply accept the realist argument that transitional justice was imposed by the western government—or the African leaders' argument that transitional justice is merely another neocolonial project—still fails to illuminate why the Kenyan ruling class initially co-operated with the ICC and the TJRC in addressing the systematic violation of human rights following the immediate period subsequent to the KNDR agreement (interview with KAF officer, no. 2, Geneva, November 26,

⁶³ The post-election violence has become a significant event in contemporary Kenya in vindicating the importance of everyday discussions about accountability and the process of linking this accountability to justice. In contrast to South Africa's TRC, Kenya's reconciliation process places a strong emphasis on 'justice'. The underlying idea behind it is that there is no reconciliation without justice, and there is no justice without accountability. Hence, the restoration process is understood as TJRC instead of TRC, in order to highlight the missing element of accountability (interview with TJRC officer, no.4, Nairobi, February 7, 2012).

2010).

Adopting Foucault's method helps this thesis to precisely contextualise in the next Chapter 3, why the Kenyan ruling class initially continued to support transitional justice mechanisms after the violence, and why they later eventually rejected the parliamentary bill on the establishment of the special tribunal in favor of the ICC. It also helps to explain why they later rejected the ICC, realigning themselves with the special tribunal and then attempting to replace it with the TJRC. The shifting preferences of the ruling class indicates the presence of a set of circumstances in which all the political agents are meditating on the acceptable standard of morality according to the dominant discourses of accountability (Wainana and Chepng'etich, 2010: p.112).

Specifically, while the ruling classes' shift in preference from the original special tribunal to the ICC's option could be considered as an attempt to avoid the realistic pursuit of justice, the ruling class could not escape from the demands for justice produced by the hegemonic discourses of accountability that arose following the post-election violence. Whether headed by the special tribunal or the ICC, the pursuit of justice was inevitable, since the violence had weakened the political elite's position. Indeed, the Waki Commission's recommendation of the ICC's approach to justice can be interpreted as the agent's attempt to confirm to other agents' behavior according to the dominant discourses; there must be a form of accountability in the criminal prosecution, since this accords with agenda items number three and four of the KNDR agreement (see Table 2.5). The MPs' attempts to re-table the special tribunal after the ICC can be taken as evidence of their intentions to delay the pursuit of justice

(Wainana and Chepng'etich, 2010: p.113).

Table 2.4: Excerpt from Various Agreements related to the Kenyan National Dialogue and Reconciliation	
Agreements	Mandates/Jurisdiction
Agenda Item Three – How to Resolve the Political Crisis	<p>IV. Regarding the need for a political settlement to resolve the current crisis, we agree on the following points:</p> <p>Such reforms and mechanism will comprise, but are not limited to;</p> <ul style="list-style-type: none"> • A truth, justice and reconciliation commission • Identification and prosecution of perpetrators of violence.
Agenda Item Four – Longer-term Issues and Solutions	<ul style="list-style-type: none"> • Constitutional reforms • Police and Security reforms • Judicial reforms and vetting • Strengthening of anti-corruption laws/public accountability mechanism • Addressing issues of accountability and transparency
Commission of Inquiry on Post-election Violence (hereafter known as Waki Commission)	<p>Identify and prosecution of perpetrators of violence, including state security agents</p> <p>Addressing issues of accountability and transparency</p>
Truth, Justice, and Reconciliation Commission	<p>No blanket amnesty will be provided for past crimes. Individual amnesty may be recommended by the Commission in exchange for the full truth, provided that serious international crime (crimes against humanity, war crime or genocide_ are not amnestied, no persons who bear the greatest responsibility for crimes covered by the commission</p>

Source: KNDR Secretariat, Nairobi, 2009

However, the avoidance of the ICC's approach to justice through the re-tabling of the special tribunal bill was an idea that was later rejected by other MPs, especially those who were allied to Prime Minister Odinga (Wafula, 2009: p.2). This can be interpreted as the agent's attempts to evaluate others based on the acceptable norms produced by the discourses of accountability, which proves that justice being delayed equates to justice being denied. Indeed, the Chief Prosecutor of the ICC rejected the

Kenyan government's official stance, and he stressed that the TJRC should be a compliment (but not an alternative) to the prerequisite of establishing accountability by means of retributive justice (Office of the Prosecutor (I.C.C.), 2009d). By January 2012, the ICC's pre-Trial Chamber II had confirmed the charges against the ICC's suspects and determined how the trial should proceed (I.C.C., 2012). Meanwhile, the TJRC commissioners clarified that the commission's operation should not be taken as a form of 'immunity' from the pervasion (impunity) of criminal justice (Amolo, 2011: p.1). This obviously limited the agent's initiative of refusing to conform to the acceptable moral standards set by the hegemonic discourse embodied by the ICC's proceedings.

To simply maintain the realist argument that agents behave according to their political interests does not explain why Uhuru Kenyatta and his deputy, William Ruto, did not absolutely defy the ICC's proceedings after their names had been confirmed as being among those of the main suspects (Sriram. and Brown, 2012: p.225). The fact that both continued "to commit" to the ICC's investigation indicates that the dominant discourses of accountability provided norms that enabled both politicians to positively comply with the ICC's proceedings. Of course, this is not to suggest that, following the post-election violence, the Kenyan leaders suddenly began to respect human rights. Rather, it highlights the fact that the participation of Kenyatta and Ruto in the process of transitional justice signified that the hegemonic discourses of accountability defined the boundaries of what was politically permissible within the context of post-2008 Kenyan politics.⁶⁴

⁶⁴ While the behavior of Kenyatta and Rotu can be seen as politically motivated, the decision of both men to continue working with the ICC indicates shows that their behavior conforms to the dominant discourses of accountability. Stepping back from the proceedings would have constituted a

The atrocities of the post-election violence justify the ‘political belief’ that no one should escape the reach of justice, and that any political debates must be connected to the idea of accountability (interview with local MPs no. 2, Rift Valley, March 14, 2012). Hence, rather than initially dismissing the ICC as being another western, imperial form of intervention, the accountability discourses provided an opportunity for both Kenyatta and Ruto to ‘reinvent’ themselves as ‘accountable leaders’ during the 2013 election campaign. ‘Prosecutions are pending at the ICC against the presidential candidate in a program of ethnic cleansing that traumatized Kenya...after the 2007 elections. Yet those cases gave the two men’s jubilee alliance a priceless fillip in last week’s [2013] general election (Wrong, 2013). The way in which Kenya’s ruling class responded to the transitional justice mechanism reveals the constellation of power relations—the arena in which every agent evaluates one another—in which every agent must conform to the dominant discourses of accountability that operate within the transitional justice debate.

Hence, the process of implementing transitional justice represents the embodiment of ‘knowledge’, in which transitional justice poses a threat to the ruling class’ status quo (Kagwe, 2010: p.448). While the formation of the political class in Kenya has been fragmented by negative ethnicity and neo-patrimonial networks, the power-sharing formula endorsed by the KNDR agreements delineated certain political ‘boundaries’. The grand coalition government, comprised of various political agents all united by the one common purpose of avoiding the pursuit of justice, had “to operate” within these boundaries (Cheeseman, 2011: p.338). However, the hegemonic discourses of

big risk of endangering their positions as members of the GNU’s cabinet, and could have plausibly limited their future political careers (interview with the US Embassy officer, Nairobi, March 4, 2012).

accountability limited their abilities to do so (Gekara, 2009: p.3); the best they could do was to resist the dominant discourses of accountability (represented by the ICC) by projecting their own, alternative discourses that embodied a different form of knowledge (through the suggestion of the TJRC): that of impunity (Klopp, 2009: p.145).

III) Transitional Justice as the Embodiment of Power-Knowledge

The TJRC, and the international and Kenyan media reports on the numbers of corpses, rape victims, refugees and IDPs have become objects of knowledge about accountability that are represented by the implementation of transitional justice mechanisms (see Somerville, 2009). This is part of the discourse of human rights, in which the victim is used as the object of knowledge that represents the conceptual understanding of violation and crimes against humanity (see Merlingen and Ostrauskaite, 2005).

For instance, on the admissibility of Kenya's post-election violence under the jurisdiction of the ICC, there is continued skepticism among commentators as to whether those responsible for the atrocities committed during the post-election violence can be prosecuted under the Rome Statute's definition of crimes against humanity (Nmaju, 2009: p.79). However, after carefully analysing all of the evidence presented by the prosecutor, and the hesitation displayed by the Kenyan government in its request to defer from the proceedings, the ICC's judges decided to confirm the charges. Citing Judge Katarina's ruling, the entire process was aimed simply to fulfil:

the purpose[s] of achieving justice - justice for all – for victims but, equally, justice for those who appeared before the Court [and] with utmost aims [to] bring peace to the people of the Republic of Kenya and [to] prevent any sort of hostility (International Criminal Court., 2012).

In such instances, the confirmation of the charges against the ICC's suspects is arguably representative of the first type of knowledge (*savoir*) identified by Foucault: the officiated knowledge that is known by members of the international public.⁶⁵

The adoption of transitional justice through this ruling of the ICC represents the liberal cosmopolitan conviction that delivering transitional justice as part of the peacebuilding domains is an inherently good, moral project (see Zanotti, 2010). Human rights discourse often uses the terms 'savior', 'responsibility to protect' and 'punishing the barbarian' in order to restore the sanctity of human dignity (Mutua, 2001b: p.202). The problem is that: 'while the image of good triumphing over evil to save the wretched may inspire a sense of moral righteousness, it fails to acknowledge that the wretched may aspire to an alternative view of dignity, rights, and the good life that offered by the savior' (Evans, 2005: p.1050).

Equally problematic is that the transitional justice mechanism, as promoted by liberal cosmopolitanism, is based on the hierarchical relationship between the savior and the victim, which can be understood as an exercise of power-knowledge. Thus, the blind application of a one-size-fits-all policy of justice can be read as the process of identifying the victims and then transforming them into new objects of knowledge. This process pits accountability against impunity (Gaitho, 2011: p.4). Yet, the victims of the post-election violence perceived that an alternative discourse of justice was being projected by the Kenyan ruling class.

⁶⁵ Although the specific technical knowledge of TJ or the ICC is only possessed by the ruling class, it was commonly understood by victims that influencing the proceedings of the international court was above their political station. As a result, they were more optimistic about justice being handled by the ICC than the national court (interview with IDP no. 23, Rift Valley, March 2, 2012).

The international pursuit of justice often ignores the deep fissures that exist between the various segments of post-conflict societies, and the fact that post-conflict governments do not necessarily represent the people's interests (interview with a UNDP officer, Nairobi, March 17, 2012). While the GNU claimed that its swift creation of a new constitution and its co-operation with the TJRC and the ICC's proceedings are evidence of its commitment to justice and reconciliation, the IDPs felt betrayed, since most of their reparative demands had not been prioritized. The only exception was when their MPs held a political rally, before the official campaign period of the 2013 election had started:

They [the GNU] promised us money as allocated in the new budget so we can buy land, but none of this money has been granted to us, and we only see it when the leaders visit us. They allocate the money during their election rallies (interview with the Matatu driver, Eldoret, March 17, 2012).

We didn't have enough money to buy food for our daily meals, and the only time we received the money was during the rally. Why is there an election rally when the priority is to compensate us? I don't understand this big man [the politician]; the election is not around the corner and the focus should be on addressing our needs, not on their campaigns! (interview with IDP no 10, Naivasha, February 7, 2012).

Let me tell you! This big man only came with this briefcase full of money promised to us and started talking nonsense about the election and the ICC. How can they talk about good leadership and building a better nation, if they don't even have a responsible leader? They look smart defending themselves from the ICC in a rally, but speechless at the Hague [ICC], and they continue to show injustice towards us by blocking our compensation (interview with the street Musician, Nairobi, March 9, 2012).

These testimonies reveal the existence of deeper tensions created as a result of the disparity between what the Kenyan government officially claimed had happened and what had actually happened to the IDPs since the crisis in terms of their needs for rehabilitation and reparation.

The transitional justice operation in Kenya embodied the alternative discourse of

Foucault's second knowledge (*connaissance*), which is discussed above. This type of knowledge relied on the same subject—the victims—but these subjects were transformed into objects of knowledge that were specifically aimed at preserving the status quo of the ruling class. The idea was to replace the original hegemonic discourses of accountability with impunity. As Foucault observes:

[t]he system of right, the domain of law, are permanent agents of these relations of domination, these polymorphous techniques of subjugation. Rights should be viewed, I believed, not in terms of a legitimacy to be established, but in terms of the methods of subjugation that it instigates (1980b: p.96).

Foucault's skepticism about the impartial objectivity of law and human rights suggests the embodiment of power–knowledge that the ICC and TJRC's proceedings in Kenya represent. The question, then, is not, “what is transitional justice in Kenya?” but, “how does transitional justice operate?”. While this still may sound like an abstract theoretical exercise, the implications of Foucault's intellectual scaffolding are very significant for the examination of transitional justice dynamics in Kenya.

Firstly, viewing transitional justice as power and the embodiment of the second type of knowledge (*connaissance*) challenges the notion that the terms ‘accountability’, ‘human rights’, ‘justice’, ‘reconciliation’, ‘peace’ and ‘unity’ can be positioned neutrally, ‘outside’ of their political contexts:

human rights law are expressions of the desire to create the proper order of things, the proper arrangements between subjects often imagined and constituted as parts of a greater whole (the state, the international community, the global economy). I want to suggest that the subjects and relations given form by these areas of international law are as integral to its political effects as are the substantive obligations ... to which international agreements in these fields give rise. In other words, the forms of law are not apolitical or neutral (Orford, 2005: p.180).

This allows the study to view both the ICC and TJRC's proceedings in Kenya as forms of political tactics, as ways of enacting power, or as being entangled with the

political struggle between those who fought for accountability and those who stand for political impunity.

Secondly, viewing transitional justice as power illuminates the complex socio-political functions of the ICC and the TJRC's current operations in Kenya. Transitional justice not only represents the liberal cosmopolitan conviction that the rule of law is objective and morally good, but also functions as a space in which the ruling class can discipline lower members of society. This political space is:

centered on the body as a machine; its disciplining, the optimization of its capabilities, the extortion of its forces, the parallel increase of its usefulness and its docility, its integration into systems of efficient and economic controls, all this was ensured by the procedures of power that characterized the disciplines; an anatomo-politics of the human body (Foucault, 1998: p.230).

As such, the operations of transitional justice also reveal the everyday resistance of the IDPs in challenging the leaders and the fictional narratives of successful reconciliation projected by the KNDR's policy (Chapter 4). By challenging the reconciliation- and justice-seeking policy projected by the ruling class, the reading of transitional justice as power uncovers the detachment of society from the state. It also reveals the bottom-up perspectives of everyday Kenyans on transitional justice; an example of what is termed here as 'seeing like a state' (see Scott, 1998).

So far, the exploration of Foucault's works helps us to contextualise transitional justice as power; it is important to observe, however, that he neglected the element of ideology. Foucault's archeology allows us to frame the dominant discourses that arise from post-election violence. Through these discourses, the agents evaluate themselves and others within a constellation of power relations; in this context, the mechanism of transitional justice represents the dual embodiments of the two types of knowledge.

However, Foucault refused to acknowledge the element of ideology as being associated with the state apparatus, asserting instead that understanding power as ideology constituted an oppressive form of power as promoted by Marxist writings (Fontana and Pasquino, 1984: p.65). As David Lecourt criticized, Foucault was concerned only with the ‘super-structure of power’, but remained silent on the positioning of ideology (1975: p.207).

Althusser’s explanation of ideology as power, which will be discussed below, allows the study to channel Foucault’s dominant discourses and the idea of the embodiment of knowledge into a concrete mechanism of power: the transitional justice mechanism as the state’s ideological apparatus as part of the ideological apparatus of post-conflict peacebuilding.

IV) Althusser’s Method: Transitional Justice as Ideological Apparatus

Althusser’s concept of ideology as a feature of the ‘state apparatus’ is more persuasive (in regards to this chapter’s attempt to project the embodiment of power onto the two transitional justice mechanisms in Kenya) than Foucault’s structural explanations of power (2001: p.108). Althusser departed significantly from the earlier, Marxist view of ideology as a ‘false consciousness’ (Allman, 2001: p.47). Marx used the term ‘ideology’ to uncover the erroneous projection or ‘capitalist’ idea of equality in social relations and modes of economic exchange (Althusser, 1971: p.12). As such, according to Marxist traditions, capitalism is based on oppressive inter-class relations and the exploitation of the proletariat (Larrain, 1983: p.4).

However, Althusser advanced on Marxist's method of ideology (as a means of uncovering hidden aspects of reality), taking it beyond its predominant associations with material or economic analyses (Albiac and Campbell, 1998: p.85). To Althusser, ideology can also be used to uncover different social and political realities. From an Althusserian perspective, due to the difficulties that the agent faces in grasping the 'real condition of its existence' (the social reality), the agent uses ideology as a means of constructing its own social reality (2001: p.109). The agent then comes to perceive this as the real state of affairs. As such, Althusser considers ideology to be a precondition of society, embedded in social practices (such as rituals) and producing socio-political identities for agents who become subjects (p.110). In other words, he attempts to describe the process whereby an individual becomes a subject. The individual's desires, preferences, choices and judgments are shaped by the structure of established social practices; many of our social functions in society can be attributed to ideological practices (Wolff, 1998: p.92).

To reveal how ideology can be more pervasive and substantial, Althusser introduced the concept of *Ideological State Apparatus* (ISA) (2001: p.227). The ISA should not be confused with the Repressive State Apparatus (RSA). Althusser also recognised Foucault's institutionalization of power (the embodiment of power-knowledge) and, in response to this, he explained the distinction between ISA and RSA (for example, see Moon, 2008; Navarro, 1998; Resch, 1989). The RSA, such as the police and army, exist to support the ruling class by maintaining control through violence (Fourtounis, 2005: p.115). While RSA functions as a unified entity (through the state's legal monopoly of force), the ISA is more diverse and plural (involving various non-coercive public institutions, such as school, place of worship and media), and are

specifically connected to the ruling class' desire to control or internalize the subject (citizen) through certain ideas (Althusser, 2001: p.98).

In other words, ISA is about molding the internal or mental beliefs and perspectives of the citizen; indoctrination by propaganda has proved itself to be a more effective form of control than direct violence. If RSA performs functions that are solely violent, ISA functions through both ideology and violence (p.98). When the public challenges the state authority, the ruling class utilizes RSA to punish society. At the same time, they use ISA to shape the identity of individuals by penetrating the private (rather than the public) realm of the individual. This can be regarded as a process of altering an individual's character by transforming him or her into a subject (for example of the usage, see also Wolff, 2005).

Blending his Catholic educational background with an innovative reading of Marx, Althusser used the church as an example of an institution that has used this process (see also Boer, 2007). For instance, the church disciplines their worshipers by instilling in them the dogmatic belief that every person is required to surrender to the salvation of Jesus Christ in order to reconcile himself or herself to God (p.483). This dogmatic belief is a form of ideology that shapes Christian values, and which was institutionalized by the church itself (as the house of God) (p.484).

However, throughout history, the church has acted as a form of ideological apparatus in serving the ruling class' purposes through the papal institutions (the RSA). Hence, in an Althusserian sense, the papal institutions represent both RSA and ISA (2001:

p.111). Repressive policies were employed during the initial period of Reformation that witnessed the rise of Protestantism (violence as a means of counter-reformation), but eventually become more ISA-oriented; the tenets of Christ and his apostles were used as an ideological apparatus for indoctrinating the worldwide Catholic community into believing that the papal institutions inherited their authority from Christ's disciples (Boer, 2007: p.458). As such, according to Althusser, the Marxist concept of ideology is not only limited to economic analysis; it can also be integrated into the realm of politics, in which certain state apparatus are used to preach certain ideologies that are conducive to the interests of the ruling class (Kogler, 2006: p.187).

By using Althusser's methodology, it is possible to identify features both of RSA and ISA in the recent political history of Kenya, and the exploitation of the ordinary populace by the ruling class. Before the return of multiparty elections in the 1990s, the ruling class had lacked internal hegemony under President Moi's regime, and his government relied on RSA to suppress the populace's struggle for a democratic constitution with direct violence (Gitari, 2008: p.23). However, after the post-election violence in 2008, the ability of the GNU to wield power through RSA was constrained by what have been identified above as the dominant discourses of accountability (TJ) (see also Okello and Sihanya, 2010). Hence, the whole process of controlling the direction of justice- and reconciliation-seeking policy should be understood as ISA rather than RSA-oriented.

Transitional justice served as an ideological apparatus for those in power, who sought to control the members of public by transforming everyone in society (including the

IDPs) into subjects who conform to the ruling class' ideology of reconciliation. This ideology is defined by the preservation of the status quo and an entrenched culture of impunity, rather than of criminal accountability (Shah, 2013b). Hence, the implementation of both the ICC and the TJRC in Kenya can be identified as ISA, which is governed here by the reconciliation ideology of the GNU and produced by the KNDR agreements.

Two major assumptions of Althusser's concerning ISA are relevant here. The first assumption is that 'ideology has a material existence' (2001: p.109), and manifests itself through actions that are 'inserted into practices' (p.109). Ideology does not appear in the form of ideas, but can be identified on the basis of agents' actions and behavior, which govern their positions as subjects (see also Wolff, 2005). Applying this assumption to the KNDR in Kenya allows us to consider the implementation of the transitional justice mechanisms (the ICC and TJRC) as attempts of the ruling class to propagate its own authoritative truth claims about political legitimacy, and to resist wider demands for establishing accountability (see Klopp and Zuern, 2007). Hence, the whole ideology of national dialogue and reconciliation (KNDR) derived its authority from the organisation of the subjects (the victims and the IDPs), objects (violations of human rights), and the concept of justice (through means of restoration or forgiveness, but not prosecution). In this way, the perpetrators are not directly identified or prosecuted (Robinson, 2011: p.17).

By employing this ideology, the two transitional justice mechanisms have allowed a specific act of convincing (through rituals) to occur. As the Kenyan public moved

forward, prosecution was overlooked, as it was believed that trials would only destabilise the country (interview with ICTJ officer, no. 2, Nairobi, February 27, 2012). Althusser's reference to Pascal's formula for belief ('kneel down, move your lips in prayer, and you will believe') is paralleled by the Kenyan elite's political understanding of justice as simply being the ideological apparatus for reconciliation (2001: p.114), in that it is pursued with an ethos of 'forgive and move forward, but don't expect any justice' (interview with an IDP no. 39, Rift Valley, March 2, 2013). Therefore, we can also use Althusser's material conditions of reconciliation ideology to identify the concrete space in which to locate Foucault's power relations.

It is in this space that the Kenyan ruling class struggles to replace the dominant discourses of accountability with its alternative discourses of impunity in the process of undermining transitional justice operations. Hence, the ICC's proceedings that will be explored in the next chapter 4 are concrete examples of a specific ideological apparatus for projecting the ruling class' resistance to wider calls for criminal accountability. They also demonstrate the everyday struggles of the victims to challenge the hegemonic discourses of successful reconciliation promulgated by the GNU. In addition, the examples indicate how these mechanisms were used for purposes other than securing justice and reconciliation in Kenya, and further explain why the entire KNDR agenda is attainable, but not sustainable.

The second's of Althusserian assumptions: 'All ideology hails or interpolates concrete individuals as concrete subjects' (Althusser, 2001: p.110). The main purpose of ideology is to transform the individual into a subject. The constitution of the subject

produces its social condition, in which rituals ensure that the subject does indeed have a concrete existence (p.110). Indeed, it is ideology that brings the subject into being.

Both the ICC and TJRC's proceedings in Kenya are a form of ISA, in which IDPs are interpolated as the new political subjects for the GNU's claims to transitional authority, and as evidence that the government represents the political community and must be assisted by the international society (Chapter 3). The KNDR agreements, the GNU media coverage that highlights the government's commitment to reconciliation, reforms and justice and the new constitutional manifesto, and the TJRC's final reports may appear similar to the recognition rituals for the ruling class' ideology of reconciliation (the addressing of past wrongdoings). However, these two transitional justice mechanisms are the material conditions for the ideological commitment to justice and respect for human rights.

By using Althusser's ISA, these mechanisms can be exposed as being the rituals with which the GNU projects its alternative ideology: that of impunity. This alternative ideology was interpolated by the GNU's ritual of shifting its preference, from its original commitment to criminal accountability to opting for the TJRC (amnesty). This can be read as an attempt to project the idea of a pervasive form of justice, in which the suspects of the post-election violence are not identified, prosecuted, or punished in any way (Jane, 2010). The idea of replacing the ICC with the TJRC can be viewed as a ritual for molding the alternative ideology, in that the public hearings of the TJRC are only designed to acknowledge the violence and palpably encourage former victims to forgive and forget. In other words, it is a form of 'justice without a

perpetrator' or any form of punishment (interview with an IDP no. 24, Rift Valley, March 7, 2012).

If Althusser's ISA allows the study to locate the process of transforming the victims into subjects of the alternative ideology of reconciliation (impunity), then Foucault's power-knowledge helps to frame the transformation of the subject into the object of reconciliation ideology. Chapter 5 illustrates the process of transforming the victims into a subject of the reconciliation ideology of the ruling class, and how the subject becomes the object of the GNU's knowledge of impunity. Hence, transitional justice is not simply a legal measure for imposing morality through laws, but is also a field that unravels the struggle between accountability and impunity. Drawing from 157 testimonies of IDPs, small-holding farmers and state officials who were direct and indirectly involved in the ICC and TJRC's proceedings, this thesis uncovers a deeper and more unsettling issue, which has been neglected by previous scholarship on transitional justice. This issue is the analysis of the salient characteristics of power and ideology, which could potentially serve as the starting point for future research on transitional justice as politics.

F – Conclusion

This chapter began by providing an overview of peacebuilding, transitional justice and power-sharing in order to highlight how the first two concepts intersect with power-sharing arrangements. This provides the epistemological inquiry for navigating towards an understanding of the complex dynamic of locating the anomaly of transitional justice institutions, and the institutional constraints imposed by power-

sharing upon justice- and reconciliation-seeking policy in Kenya. In addition, this chapter has undertaken an exploration of how the key debates in liberal peacebuilding, transitional justice and power-sharing have helped this thesis to set up its parameters of analysis. This exploration has also helped to clarify the primary terms used throughout this thesis, such as ‘reconciliation’, ‘peace’, ‘justice’, and to broaden the scope of transitional justice research conducted by the author in Kenya.

By revisiting key debates in liberal peacebuilding, transitional justice and power-sharing, I have positioned the critical stance adopted by this thesis in line with CPS and CLS to reveal the deficiencies of post-conflict peacebuilding and transitional justice experiments in Africa in order to localise the peace process of the KNDR installed by the Kenyan government. Equally important is the fact that I identified the core theme of my research in Kenya, which is that the formulation of KNDR policy has served to make human rights violations subordinate to political impunity in justice- and reconciliation-seeking policy. The way forward lies in analysing the issue of justice and reconciliation in Kenya through the recognition of the complex local milieu, and the political considerations of the legal measures undertaken by the Kenyan government. This serves as the thesis’s launching pad for Chapter 3, from which I clarify the local context and illuminate the invisibility of the victim’s position in the top-down approach of the ruling elite and their international partners.

In light of this understanding, I introduced the reader to my conceptual framework in order to guide the reader through my reading of transitional justice in Kenya. This reading is defined by twinning the struggle between accountability and impunity with that between power and ideology. As such, the framework has revealed that the idea

of accountability is not novel, and has been one of the predominant themes of Kenyan politics and society since the return of multiparty elections. However, the notion of accountability has been limited to a discussion based solely on procedural democracy. I have argued that the debate over whether or not to hold the leaders accountable can be integrated into the contemporary debate on transitional justice processes in Kenya. Theoretically, Schedler's two elements of accountability can be connected to two transitional justice mechanisms: answerability and enforcement through the ICC and TJRC's proceedings. However, the process of holding leaders accountable through transitional justice mechanisms has been impeded by the entrenched culture of impunity. As such, any reading of the political reconciliation project designed by the GNU must contextualise it in terms of power and ideology.

Drawing the theoretical perspective of power and ideology from the writings of Foucault and Althusser, and the existing works of Moon and Thomson, this chapter has presented a conceptual framework for connecting the two distinct transitional justice mechanisms that are currently being implemented in Kenya. As shall be discussed in the next three chapters, although each measure performs a different judicial function, they all share a common feature. They are not simple judicial measures for addressing past atrocities, but represent an incomplete process of reconciliation: a form of justice without punishment. In such instances, the political analysis of transitional justice suggested here helps to identify specific forms of neo-patrimonial practices that were adopted in the wake of post-election violence.

Of chief importance among these is the persistence of impunity, or the continued perversion of justice, in which the ruling class attempted to subdue the public, official

demands for accountability. Impeding and privatising the whole idea of justice and reconciliation by hijacking the justice-seeking mechanisms achieved this. What were initially understood in transitional justice literature as legal instruments for addressing past wrongdoings have become political devices that benefit members of the ruling class, rather than the victims. In the next Chapter 3, the discussion shall reveal the responses of the international and national elite to transitional justice mechanisms in Kenya. Followed by Chapter 4 and 5, the thesis reveals the responses victims through the narratives of IDPs. The use of this bottom-up approach helps to articulate a more nuanced understanding of justice and reconciliation from the perspective of those who directly subjected to violence.

However, two points should be borne in mind here. Firstly, by sketching transitional justice as a form of power and ideology in this thesis, I do not claim this to be the absolute political reading of transitional justice in post-conflict societies, nor do I suggest that politics takes precedence over legal discourse. The conceptual framework suggested here simply follows the suggestions of Milja Kurki and Colin Wight that, rather than placing particular international phenomenon within the strict confines of IR theoretical analysis, various perspectives should be recognised and the diversity of IR theory should be celebrated (2010: p.28). For instance, the assumption that certain terms in the human rights vocabulary—such as ‘justice’, ‘reconciliation’, ‘victim’ and ‘violation’—are subjective has only served to strengthen my support of Robert Cox’s claim that theory is always about someone or something (Moolakkatu, 2009: p.440).

As such, transitional justice research should also consider questions surrounding agencies and the motivation of agents, and the temporal and spatial conditions in

which a given agent invokes the use of human rights vocabulary. In the case of Kenya, while the agent (the ruling class) understood the pervasive elements or dominant discourses of criminal accountability through justice and punishment, they were also capable of manipulating the dominant discourses by projecting an alternative one of impunity. A careful analysis of the agent's behavior reveals that the impartiality of transitional language has been subjected to various political predilections which favor the ruling class and oppress the victims. The combination of Foucault and Althusser suggested here is not novel, but advances on the existing works of Moon and Thomson, and provides one of the plausible paths for reaching an understanding of the logic of politics in African studies, as well as of legal dynamics in post-conflict studies.

Secondly, I do not suggest this is the best approach to contextualising the interaction between politics and law, or that it is more nuanced than the CLS approach to analysing transitional justice. Rather, I have proposed an alternative understanding of legal dynamism in politically structured environments (for similar advice, see Balkin, 1987). This alternative understanding suggests that what was previously understood as transitional justice cannot be strictly confined to a legal positivist understanding of legal measures as being impartial to the complex issues that surround any political transition. The strict parameters delineated in Tietel's *Transitional Justice* (2000) remain problematic. The issue is not whether the framework suggested by this chapter is either political or judicial, or whether or not the situation in Kenya provides a case study for transitional justice (similar conclusion made by Thomson and Nagy, 2011 for the case of Rwanda).

Rather, the aim is to highlight the danger that transitional justice represents in the way that it challenges the binary distinction between law and politics in Kenya. This chapter has also sought to prove that the terms understood in the field of transitional justice as ‘justice’ and ‘reconciliation’ have not been applied to IDPs by the international and national elites. They have been victimised twice; the first time during the violence, and the second time after it. This is because those who claim to be victims are continually being violated by being made to wait for an embodiment justice that has never been delivered. If this is the case, there are reasonable grounds for venturing into the narratives of the IDPs, which will be explored in the Chapter 4 and 5 respectively.

Chapter 3: Political Economy of Violence – Dealing with Post-election Violence and Developing Transitional Justice in Kenya

‘Kenya has become a country of ten millionaires and ten million beggars.’ (J. M. Kariuki, A Kenyan politician, assassinated in 1975.)

A – Introduction

This chapter begins by revisiting the causes of the political crisis in the country. Although the immediate trigger for violent conflict was the dispute over election results, the Commission of Inquiry into Post-election Violence (known also as the Waki Commission, after its Chairperson, Justice Waki) acknowledged that the underlying causes of the violence were much deeper, and included the inequitable distribution of resources, historical injustices, the systematic violation of human rights and an embedded culture of impunity (Waki, 2009: pp.345-51). Hence, the aim is not to provide a detailed analysis of the crisis, which has been documented elsewhere (see below), but to highlight the key causes of the crisis that have been implicitly and explicitly connected to the key themes of justice- and reconciliation-seeking policy in Kenya since February 2008.

The second part briefly illustrates the nature of the Government of National Unity (GNU) and the national dynamics that were present, and shows how the local dynamics converged to create the conditions in which the attempts to deal with post-election violence inaugurated the coming into being of a justice- and reconciliation-seeking policy. This highlights the difficulty of building a robust transitional justice policy in Kenya, and the thesis’s point of departure is to acknowledge that justice

measures are embedded in wider socio-political processes, power and ideological apparatus, based on framework developed in previous chapter 2. This chapter asserts that Kenya's difficulty in developing a transitional justice policy is a product of the power-sharing arrangement, and that attempts to deal with post-election violence contribute to a process whereby political reforms and measures to end impunity can be regarded as part of the generative process of developing justice- and reconciliation-seeking policy.

B – Political Economy of the Post-election Violence

Much has been written about the Kenyan post-election violence and, unsurprisingly, the 2008 crisis has led to the publication of special issues of *The Journal of Eastern African Studies* (2, 2, 2008), *The Journal of African Election* and the *Les Cahiers d'Afrique de l'Est* (38, 2008). The special issue of the *Journal of Contemporary African Studies* (27, 3, 2009) was later published in the edited volume *Kenya's Uncertain Democracy: The Electoral Crisis of 2008*. However, echoing similar concerns voiced by William Zartman, most conflict analysis is based on epistemological assumptions about 'meta-conflict', or how and why the violence erupted (2001: p.15). Instead of engaging in a substantial analysis of the full details of the post-election violence, this section adopts an approach based on political economy in order to provide a better understanding of some of the issues to which the TJ mechanisms (the ICC and TJRC) implemented in Kenya must respond.

Here, 'political economy' refers to the element of continuous ambiguity that has been produced and reproduced by the crisis; the 2008 post-election violence is not unique, but is rather a systematic indication of the structural violence that has shaped modern

Kenyan state-society relations (Anderson, 2005; Branch et al., 2010; Lynch, 2011b; Mueller, 2008). This helps to inform us how violent conflict has had a regressive effect on the democratic progress and justice-seeking processes that Kenya has arguably made since the early 1990s. Additionally, it shows us how the contested narrative of who is ‘right and wrong’ (a narrative that emerged as a result of the unequal distribution of wealth and power in Kenyan society) has provided further incentives to address the issue of criminal accountability, impunity and systematic violation of human rights (Kiai, 2008: p.143).

It is equally important to highlight the fact that the causes of the electoral disputes themselves are contested within the literature of Kenyan politics. The theme suggested below does not imply the causes identified are necessarily the dominant factors behind the electoral disputes. Rather, I suggest that these causes are far from ideal, or that they have simply been selected on the basis that they are commonly cited in debates surrounding the nature of contemporary Kenyan politics, as well as those concerning the contextualisation of the issues of justice and reconciliation after the 2008 crisis. Some of the discussions below are not solely related to electoral violence per se, but can be connected to further discussions of various types of violence faced by the country, namely the terrorist attacks and political violence by *Al-Qaeda* upon the US embassy in Nairobi in 1998; the *Al-Shaabab* militancy's bombardment of Westgate mall in 2013; the mobs of the criminal underworld that operated in the city through the transportation networks of *Matatus*; urban strikes by members of civil society; the democratic uprising of the 1990s; the failed military coup of 1982; rural inequality and land disputes; corruption and economic crimes; Shifta war; minority diaspora; cattle rustling among pastoral community and many other instances.

However, it is highly ambitious to mention all of these despite their interrelations with the broader concerns of justice and reconciliation that have emerged out of the local peace agenda that ended the electoral crisis. The fact that the local peace agenda was successful restored public faith in the state actors and local politicians. Suffice to say that the focus on the causes of electoral crisis relates to the thesis' predominant intention of articulating concerns about justice raised during 2008 crisis, and how this lead to the institutional formation of transitional justice institutions.

Most scholarly works on Kenya have identified four major structural and agency-based explanations of the crisis, namely: i) the post-colonial state, the politicization of ethnicity and the neo-patrimonial logic of governance; ii) land disputes and historical injustices; iii) the normalisation and criminalisation of violence, and iv) the fallacy of democratic sequence. These explanations are briefly illuminated below.

D) The Post-colonial State, the Politicization of Ethnicity and the Patronage System

Most historical explanations of the modern crisis in Kenya follow a similar logic in assessing how the fictional character of the African state was created as a consequence of the 'Scramble for Africa' (Blundell, 1959; Branch, 2011; Elkins, 2005; Leys, 1975; Lonsdale, 1967; Munene, 2005; 2012; Renison, 1963; Singh, 1965; Vasey, 1956). The creation of the colonial state was a means of strengthening the political and economic vehicles of imperial expansion, which altered the pre-existing logic of relations and governance that existed during the pre-colonial period (Tamarkin, 1973: p.260).

While what has been defined as ‘pre-colonial understanding’ in terms of social relations and the fluidity of ethnic identity as modes of exchange and belonging is imperfectly understood, most historical studies of Kenya’s colonial period agree that the transfer of power over the vast territory known today as ‘Kenya’, from the private British East India company to the British Empire, marked the birth of the colonial state. This induced violent conflict between Europeans and various indigenous communities in Africa, and altered the existing pre-colonial modes of economic and social exchange (Berman, 1990; 1977; Hornsby, 2013; Zwanberg et al., 1975).

While there were many contributing factors to the construction of the colonial state, arguably the chief among them was the ability to acquire Africans as a source of cheap labour and as a means of securing a buffer zone for the railway project from the existing British territory in Uganda to the port in the coastal province of Mombasa (inside Kenya), the colonial introduction of *kipande* (the identity card), the invention of Chieftaincy (a means of indirect rule) and the creation of colonial districts⁶⁶ through forced segregation altered pre-colonial ideas of intermingling, and restricted the population’s freedom of movement (Coldham, 1979a; Lonsdale, 2004; Saether et al., 2000). As a result, new models for economic relations were created, and these impacted significantly upon the idea of ethnic attachment to certain spaces, ‘the separation and isolation of different ethnic categories took place...Luo, Kipsigis and Kikuyus workers [restricted from moving to other districts]. Each community kept to their category of jobs assigned... These workers lived separately...contributed to the

⁶⁶ The colonial office created several types of district, including the ‘White Highlands’ (the most fertile region, which belonged exclusively to the European settlers for economic reasons related to cash crop production), ‘Native Reserves’ (mostly unfertile lands allocated to locals), ‘Outlying Districts’ and ‘Closed Districts’. The local population was forced to relocate to these specific districts, and this gradually endowed these districts with a new sense of exclusiveness. The post-colonial government retained these colonial state districts as part of the repopulation strategy of the new independence government, see Lonsdale, 2000; Wanyonyi.

emergence of specific ethnic stereotypes’ and perpetuated future political ideas about ethnic exclusive confinement to certain districts’ (Wanyonyi, 2010: p.34).

Bruce Berman’s analysis has confirmed how such exploitative colonial experiences triggered the moral economic crisis, which created new ‘rules’ of relations based on moral, economic and colonial assumptions about the inequalities, authorities and reciprocities that govern relations and conflicts based on patron-client relationships (Berman and Lonsdale, 1990b; Berman, 1991; Berman et al., 2009).

The literature also highlights the imprecise usage of ‘tribal’, instead of the more neutral term of ‘ethnicity’, to describe social and political relations (Muigai’t., 2004: p.201). The word ‘tribe’ is derived from the Latin word *tribus*, which denotes a mode of belonging to one united community that has nothing to do with blood or biological connection, referring instead to a group that unites in a particular place in order to settle down (in contrast to nomadic lifestyles) (Wa-Mungai, 2010: 75.). However, the usage of the word ‘tribal’ to refer to African populations carries the associative baggage of ‘inferiority’, as Africans were subjugated by the colonial government instead of being made proper citizens (Wanyonyi, 2010: p.36). A study by Ranger also describes the different invention and usage of positive and negative ethnicity (2010: p.212). Hence, what is commonly described as ‘negative ethnicity’ refers to the use of ethnic identity for political purposes, such as that of mobilizing voters who share certain ethnic attributes to engage in violent conflict with other groups (Odhiambo, 2004: p.168). Effectively, this ensures constant conflict between different ethnic identity groups, which results in some groups negotiating their fusion with larger groups and others becoming fragmented into smaller factions (Lynch, 2010a:

p.178). Such movements are continuously being exaggerated and redefined by the contested socio-economical and political environments in which the groups exist (Berman et al., 2009: p.466).

The Kenyan modern crisis was orchestrated by the nature of the colonial state in such a way that the focus on the foundation of national conflict was directed internally on ethnic communities (Klopp, 2002: p.270). These communities were defined by issues of leadership and reciprocation between patrons and clients, while being connected to a state that was valued only as a source of wealth (Lynch and Anderson, 2013: p.87; Steeves, 2006: p.198). Ethnic politics were strengthened by a predatory colonial state, which is demonstrative of the purpose for which it was made: as an instrument to facilitate the economic exploitation of the majority for the privilege of the minority (Mutua, 2008: p.99).

These specific understandings of the roots of the modern state crisis in Kenya are explicitly and implicitly connected to the larger literature concerning state crises in African politics, in which it is asserted that the post-colonial state relied on the extra-judicial features of the Westphalian state. However, this state lacked the characteristics of empirical statehood or internal hegemony, as those who occupied the apex of the state failed to secure absolute legitimacy from their own citizens (Betts, 1990; Clapham, 1996; Herbst, 2000b; Jackson, 2005; 1990; 1984; Mamdani, 1996; Nugent, 2004). However, recent studies by Tim Glawion have challenged the excessive use of terms like 'weak or failed state' in Africa, on the grounds that the debate about whether there is such thing as a 'state' in Africa is still ongoing (2013: p.39). Considering the problematic adaptation of the Western concept of statehood in

describing the political trajectory in Africa (as Hegel himself recognised his limited understanding when he erroneously assumed that Africa was an unhistorical continent (see Taiwo., 1998)) this thesis suggests that it is expedient to examine how political authority has been historically and gradually developed in Africa (Glawion, 2013: p.40).

Recognising the indication of neo-patrimonial logic and the crucial roles that external agents have played in the continuing process of constructing political authority in Africa (since the colonial era until the recent period of international intervention), perhaps post-election violence that revolves around power alternation is best understood as the process of developing political order that plays out gradually at various levels and involves various actors at lower levels of the state, before such contestations become transformed into more inclusive (and plausibly more peaceful) attempts to build legitimate political authority at the upper levels of the state (Cheeseman, 2008; Chris, 2009; Ismail and Deane, 2008; Ishiyama, 2009; Stevenson, 2008).

Indeed, in her study of post-genocide Rwanda, Susan Thomson expresses her preference for the term 'regime' rather than 'state', since what was formally understood as the state by the Rwandan Patriotic Front (RPF) had only a tenuous connection to the majority of peasants who lived in Kigali (2013b: p.11). This connects to James Scott's idea of 'seeing like a state', as such a state does not exist in the minds of its citizens (1999: p.200). In the case of Rwanda, the term 'regime' described the power relations between the RPF ruling elite and the ordinary peasants; every Rwandan had a different idea about what the state meant to him or her.

Consequently, this raised questions about the nature of power relations, and the ability of the RPF regime to instill political order among the Rwandan population (Thomson, 2013b: p.12).

As such, several historical instances of pre- and post-independence periods in Kenya can be cited to support the argument that conflict is the struggle between various factions to develop political authority. A political struggle against the colonial political authority was visible during the pre-independence period; the struggles of the landless Kikuyus against both colonial British and loyalist Kenyans were represented by the 1952-1962 *Mau Mau* Emergency (Anderson, 2011: p.700). The struggle between competing interests of rival ethnic groups was exacerbated by the association of political affiliation with ethnic character that appeared in the 1950s (Gertzel, 1969: p.34). The restrictive British policy of basing political association on trans-ethnic communities in the 1957 district elections had an unprecedented effect on the future development of political organization.

In the late 1960s, the independent political parties of the Kenya African Union (KANU) and the Kenya Democratic Union (KADU) were created, and fought for a political system that was free from ethnic bias (Nasong'o and Murunga, 2007: p.5). While there were various social movements and religious organisations based on ethnic affiliations that supported both KANU and the KADU, ethnic-based organisation were based on a positive sense of ethnicity (at least in this short period) in order to mobilise the population to strive for the greater cause of independence beyond ethnic boundaries; Kenya's imagined political community would consist of plural identities (Matanga, 2003: pp.33-35).

In realising this dream of harnessing political authority, the KANU offered a *jimbo* (a unitary and centralized political order) manifesto, whereas the KADU⁶⁷ offered a *majimbo* (a decentralized political order that guaranteed the protection of ethnic minorities) manifesto in its allocation of revenue, taxation, access to education and rural development (Mueller, 1984: p.419). KADU lost the elections, which led to the installation of the KANU's centralized version of political authority, with Western governments indicating their strong support for the party. This Western support for a centralized political authority can be partially explained by the fact that the structure of post-colonial African countries was affected by Cold War rivalries.

In turn, at the domestic level, politics led to competition for access to economic resources and power among the various ethnic barons, exemplified in the political collusion of KANU (ruling from 1963 until 2002) with the National Rainbow Coalition (NARC) in the 2002 election; both governmental and opposition politicians invoked a negative concept of ethnicity during the election processes, later abandoning their own ethnic communities and relying on the patronage system to enrich themselves, rather than addressing the wider issue of inequality among Kenyans.

In such instances, the colonial logic of distinct ethnic groups affected national unity; political affiliations became concomitant with the ethnic community that each party was believed to represent. Thus, the construction of ethnic identities by the colonial

⁶⁷ The KADU's supporters were more inclined towards the Soviet bloc, and later the African Way of Socialism, based on the criticism that the centralization of political order offered by the KANU may have structurally marginalised the small ethnic groups, since bigger ethnic communities like the Kikuyu and the Luo supported the KANU, while the KADU was mostly associated with small ethnic communities.

political authority was taken for granted by President Jomo Kenyatta's regime in its projection of its own political authority. Relying on the indirect support of the external Western bloc during the immediate post-colonial period (the early period of the Cold War), Kenyatta denounced his opponents (former KADU supporters) as being associates of the Soviet Union, and banned multiparty elections.⁶⁸ Kenyatta's opponents, led by Oginga Odinga, had a different vision of developing political authority, which was based on the "African way" of socialism to reject ethno political organisation and raised concern over ethnic majority tyranny against small ethnic minorities (Odinga, 1967: p.45).

Of course, his 'egalitarian visions' of political authority based on ideology and social class easily allowed the Kenyatta regime to denounce him as a traitor; with a support of aid from Western government (p.76).

One of the significant contributions of the early political struggles between two major factions of the above system of politics to contemporary demands of justice is that the old debate about *majimbo* institutional arrangements that was initiated by KADU 'reappeared' within the anti-establishment rhetoric of the late 1980s, the democratic struggles of the mid-1990s and in the advocacy of human rights and local transitional justice among the opposition and civil societies in the 2000s (Anderson, 2010; Marie-Emmanuelle, 2006). This helps to inform us about the modern and hybrid origins of the politics of rights in the country's attempt to move away from its past legacy of

⁶⁸ One year after independence, KADU were dissolved and voluntary join KANU based on the premise that a single party system might provide strong unity. In 1966 former KADU leaders from Oginga's supporters defected from KANU and won by-elections under new socialist party of Kenya People's Union (KPU). They were later imprisoned by Kenyatta, marked strong sense of ethnic belonging to particular leader that continually appeared in every election crisis in Kenya, see Throup and Hornsby, 1997.

authoritarian rule.

In summary, negative ethnicity as one of the fruits of colonialism played a pivotal role in explicitly and implicitly facilitating Kenyan politicians' struggles to project their political authority with the indirect blessing of superpowers or external agents (Brown, 2011; 2001; Brown, 2004; Muriuki, 1995; Munene, 2012). Consequently, negative ethnicity provided a means of mobilising political support when multiparty elections were reintroduced in the 1990s.

Echoing Donald Horowitz's constructivist approach to ethnicity in Africa in his earlier works (1985), Sebastian Elischer has identified three types of political party in modern Kenya: the mono-political party, the multi-ethnic alliance and the multi-ethnic integrative party (2010: p.201). His conclusion is that, although 'Kenyan parties have increasingly incorporated diverse communities they have consistently failed to bridge the country's dominant ethnic cleavages' (p.202).

Hence, political parties are conflict-inducing; the return of multiparty elections in Kenya allowed the KANU to retain its incumbency for two more consecutive elections through violence (1992, and 1997), brought the NARC to power in 2002 (through the same logic of ethno politics), and enabled the post-2007 power-sharing coalition between President Mwai Kibaki and Prime Minister Rahila Odinga (between April 2008 and March 2013), which was forged simply as a means of winning power (Anderson, 2003; Cheeseman, 2008; Mutua, 2008; Hornsby and Throup, 1992; Throup and Hornsby, 1997).

Such a dilemma of ‘multi-ethnic coalitions reflects the demographic reality of Kenya as a country of ethnic minorities as opposed to a clear ethnic bifurcation in countries like Rwanda and Burundi’ (Kagwanja and Southall, 2010: p.6). As such, political crisis manifests itself in the leaders’ struggle to establish a political order based on negative ethnicity, which has consistently revolved around the four major ethnic communities: the Kikuyu (22%), the Luhya (14%), the Luo (13%) and the Kalenjin (12%). As regards the minorities, 38 other communities have been mobilized into one of the political alliances of the four major communities (p.7). Since then, the Kenyan political landscape has revolved around ethnic coalitions, viciously formed in an attempt to win elections, and this has predictably triggered crisis (Klopp, 2001: pp.453-517). ‘If the December [2007] elections were hijacked, we all [Kenyans] blamed it confidently on tribalism. In any case, ...the violence that rocked the country seemed to pit certain tribes against others’ (Wanyonyi, 2010: p.33).

Consequently, the post-election violence is a ‘fruit of perception’ and is caused by the repeated ‘blame game’ that results from the economic disparities between Kikuyus and other ethnic groups, as the former were first favoured by colonials and then favoured by the Kenyatta regime, which now spread the xenophobic message of ‘our turn to eat’ in relation to the opposition to the incumbent (President Mwai Kibaki of Kikuyu). This message has become ubiquitous by dint of having been spread using social media and mobile text messages (Kagwanja and Southall, 2010: p.11). Indeed, Amy Chua’s analysis of the impact of the advancement of telecommunication infrastructure upon communal-based democracies has confirmed the global trend of targeting economically advantaged minorities in electoral campaigns for highly-contested elections in Asia and Africa (2004: p.14). However, this thesis asserts that

ethnic explanations alone are insufficient in an analysis of this kind without also considering interrelated injustices concerning land displacement and history.

II) Land Displacement and Historical Injustice

Given the abundant evidence for historical injustice related to land disputes perpetuated by the colonial government, nearly all election crises since the return of multiparty in the 1990s have revolved around land ownership in Kenya (Kamungi, 2009; Kanyinga, 2009; Rutten and Owuor, 2009). The interconnection of land with the formation of social identity and individual self-mastery has been documented in Daniel Branch's analysis of the landless *Mau Mau*, in which land was considered to be a material precondition for the reconstruction of identity and social status among the various ethnic communities in Kenya (2009: p.117).

Current multiple land claims and disputes in Kenya can be traced back to the oppressive land policies undertaken by the Colonial Office, as well as by Kenyatta's regime when the country achieved independence (Kilson, 1957: p.602). The British awarded the most fertile lands to European settlers for cash crop production, resulting in the forced eviction of various indigenous African populations who had hitherto occupied these lands to the infertile land areas (Coldham, 1979a: p.73).

These land schemes provided the basis for the first land dispute, as those who were forcibly evicted had to settle down in other areas that were already occupied by other ethnic communities. The most famous among these colonial periods of land struggles is that which witnessed the clashes between the landless *Mau Mau* and the rich

loyalists and colonialists (Berman and Lonsdale, 1990a; see Berman and Lonsdale, 1990b).

When the country became independent, Kenyatta's regime implemented a 'willing-seller and willing-buyer' policy, which was partially funded by the World Bank to allow the new African elite to acquire land from the European settlers (as part of the arrangement of decolonisation, and the transfer of power) (Leo, 1981: p.218). Far from addressing the disputes surrounding the existing land plots that were previously taken by former colonials, Kenyatta's regime magnanimously awarded most of the land plots (mostly in the Rift Valley⁶⁹) that were taken from the Kalenjin and Nandi communities by the British to the Kikuyus' patrons and their political clients from other ethnic communities. In the long term, this led to illegal land acquisition and an unequal pattern of land ownership determined by class and ethnic affiliations (see Coldham, 1979b; 1978; Harbeson, 1971).

Hence, while many structural land injustices were triggered by colonial experiences, the post-colonial African elite is mainly responsible for exacerbating the crisis. This constitutes what Ian Taylor identifies as a 'blind spot' in the analysis of African politics, since the local instability that provoked international intervention (foreign aid, SAPs and sanctions) in many of these African crises was mostly caused by the mismanagement of state resources and the local elite's abuse of power on achieving independence (2004: p.412). By exploiting ongoing continued land grievances, competition and ethnicity-based politics, politicians have constructed devices for inducing more violence.

⁶⁹ The modern Rift Valley boundary traces its origins to the White Highlands created by the colonials. The legacy of cash crop farming left by the white settlers, and the fertile composition of landplots within these provinces explains why the land remains the epicenter of national conflict.

Recent studies based on David Anderson and Emma Lochery's map analysis have indicated the precise connection between land disputes and the movement of violence (2008: p. 332). A map analysis from satellite images of several provinces taken during the weeks of post-election violence has shown an empirical, visual correlation between violence and location; violence tends to move around the same plots of land that were historically claimed by many stakeholders (p.333). Thus, land has become a 'weapon of destruction' (see Rutten and Owuor, 2009), through what has been identified by Sarah Jenkins as an 'immigrant-guest metaphor' (2012: p.3).

Regardless of ordinary Kenyans' ethnic origins and economic positions, those who vote for the local politician who is 'considered' to be local by the majority of voters will be treated as a 'guest', even if he mistreats the less-disadvantaged local populations (p.8). However, those who vote for a candidate who is deemed not to 'belong', or who is not widely supported by local voters (even if the individual is not rich) will be considered as an 'outsider' or an 'immigrant' (Kagwanja and Southall, 2010: p.8).

Hence, the Kikuyus who enjoyed the benefits of Kenyatta's land policy and settled in the Rift Valley (which had hitherto been considered as the homeland of the majority of the Kalenjin) are most likely to become a source of hatred among the populace and to be subjected to physical violence. Consequently, some of these have been forcibly displaced to locations outside the Rift Valley (Kamungi, 2009: p.352). Such a politically constructed metaphor as the 'immigrant-guest' metaphor challenges the erroneous assumption that ethnic conflict, in any given instance of violent conflict

(for example, see Huntington, 1993; Kaplan, 1993), involves people killing their opponents because of primordial differences or 'ancient hatred' (see Horiwitz and Horowitz, 1989).

Similar studies of Rwanda (Kuperman, 2004), Burundi (Vandeginste, 2009), Northern Uganda (Borzello, 2007) and Mozambique (Schafer, 2007) have confirmed the fact that, while individuals do harbor different group affiliations in their various social and economic interactions during relatively peaceful periods, they kill each other during conflict because they were either forced to do so by their superiors, local politicians, warlords, or simply as a means of surviving the war. Such fluidity in the of identity conflict roles before, during and after the violent conflict challenges the existing notion of the dichotomy of perpetrator and victim in a debate about criminal accountability undertaken by the ICC's proceedings (Chapter 4). At the same time, violence related to land displacement is connected to the increasing usage or normalisation of violence from the state down to illegal non-state actors.

III) From Normalisation to Criminalisation of Violence

Having considered the historical analysis of most election episodes and their recurring patterns of violence, perhaps Susan Mueller's observation of Kenyan politics provides the most compelling explanation, with her claim that electoral violence in Kenya was predictable before the electoral crisis (2008: p.186). While many researchers of democracy have overemphasised the roles of formal institutions, the separation of power, political parties and regime transitions in their studies of democratisation in developing countries, they tend to ignore the incentives behind the agents' behavior and the role of violence in democratic processes (p.187).

When elections, reforms and constitutional processes are accompanied by violence, the relationship between democratisation and violence must be explored. The assertion is not simply posited on the basis of the claims of opponents of democratic peace that democracy induces more violence or that an authoritarian regime is more pacifist. Instead, it draws from John Schwarzmantel's analysis of how political and economic liberalisation that grew from the combination of international and local demands for procedural democratic discourse against the authoritarian regime in the 1990s provided an incentive for economic activity with criminal⁷⁰ features (2013: p.5).

While the incumbent may perpetuate violence against anti-establishment movements to claim his legitimate rights of monopoly and to defend order, executing violence or legal enforcement in hybrid democracies like Kenya requires the state to sometimes opt for extra-judicial measures, such as political assassination and the recruiting of criminal groups (Mueller, 2008: p.190). This not only reflects the inability of the state to be seen as legitimate, but also obscures the distinction between what is lawful and unlawful. This creates a spiral effect in transmitting the use of violence from state to criminal non-state actors who perform vigilante functions (Lynch, 2013a: p.161). The paradigm shift in the repressive rules of the three major leaderships of Kenya indicates the transition from normalisation to the criminalization of violence, which is discussed below.

⁷⁰ While the country does not display a prevalent pattern of homicide (in comparison to Western countries during the 1990s), there are various crimes related to mob justice, political assassination and urban gang violence that have not been captured and indexed by major international, regional, sub-regional and national crime statisticians. For a further explanation, see Lynch, 2013a.

i) The First Republic: ‘Kenyatta State’ (1963-1978)

If the previous sections have provided a more structural explanation for the crisis, this section enacts a crucial step in recognising the post-independence ruling elite’s liability in exacerbating the crisis. The literature on Kenyan politics highlights the legacy of Kenyatta and Moi’s repressive rules. For instance, during the immediate post-colonial period (1963-1978), Kenyatta relied on three administrative functions: ‘republic of the elders, the orders of the state and accumulation of wealth’ (Berman et al., 2009: p.465). Donald Rothchild labels these administrations as ‘hegemonic exchange regimes’, in which a portion of the state’s power and resources were proportionally shared among key groups to ensure some degree of balance and accommodation, while democratic freedoms were simultaneously controlled, preventing a formal institutional arrangement from facilitating the nation-building process (1986: p.25).

The government has several times included representatives from various key ethnic groups throughout different administrations, but in the vast majority of cases the ruling party has relied on the support of the ethnic group affiliated with the president (as Kenyatta did with the Kikuyu). As is confirmed by David Throup’s analysis of Kenyatta’s state, while the structure of the post-colonial state relied on the colonials’ projection of negative ethnicity, Kenyatta exploited the colonial system of provincial administration (instead of reforming it) to govern various ethnic communities by bribing their leaders (who included the elders and chieftains empowered by the colonials) with patronage resources (1987: pp.35-46). These included the power of any leader to use unrestricted and unlawful means to interrogate any person who was seen to be undermining his supremacy.

The accumulation of wealth or state revenue needed by Kenyatta to buy his clients' loyalty was rewarded through neo-patrimonial means in the guise of his policy of *Harambee* (Let's pull together) project (Hyden, 1987: p.125). This not only resulted in bribery, corruption and economic exploitation, but marked the beginning the ruling class' unrestrained 'eating' that triggered the national economic crisis, constant budget deficits, outstanding debts and the nation's dependency on foreign assistance (Swainson, 1978: p.362). The process known as 'localising' (implemented using community projects that arose from *harambee*) can be viewed as the attempts of leaders to buy grassroots loyalty (during voting and elections) by providing instant material benefits. Hence, instead of addressing the unequal distribution of wealth resulting from negative ethnicity, *harambee* became the instrument with which the ruling barons were manipulated into vying with each other to secure Kenyatta's various tenders in exchange for building their own clientalist networks and securing political supporters (Nyangira, 1978: p.16).

ii) The Second Republic: President Daniel arap Moi (1978-2002)

However, the Second Republic (1978-2002) under President Moi, who originated from the less disadvantaged⁷¹ Kalenjin community, provided a precedent for the normalisation of violence in future election periods (Mueller, 2008: p.200). Owing to being unable to access the state patronage resources that Kenyatta had enjoyed by virtue of the Kikuyu's better economic position and Kenyatta's circles of support, as well as the simultaneous collapse in the global coffee market (Kenya's main revenue),

⁷¹ There is a wider disagreement on the position of Kalenjin (the second biggest community in Kenya) as less advantaged in comparison to the Kikuyus' economic and political positions. The position of disadvantaged Kalenjin cited by this thesis draws from the argument made by Susan Mueller (2008). The ethnic political dynamics among the Kalenjin as disadvantaged group in contrast to the Kikuyu have been challenge by Gabrielle Lynch's *I say To You: Ethnic Politics and the Kalenjin in Kenya* (2011b)

‘Moi had to take away before he could give’ (p.201). Refusing to help the poorest Kalenjin constituencies through *harambee*, Moi adopted extra-judicial methods to curtail the Kikuyu’s economic position and displaced Kikuyus from many of their land plots in the Rift Valley that had previously been awarded to them by Kenyatta (Widner, 1993: p.15).

The use of informal methods of violence and criminal gangs to control opponents became widespread following the failed military coup of 1982 and the return of multiparty elections in 1992 (Haugerud, 1997: p.86). Subsequently, this inspired other ruling KANU members and opposition political elites to utilise various criminal gangs, including the infamous *Mungiki*⁷², used by Kikuyu barons to retaliate. This predicament encouraged the privatisation and normalisation of violence, and made shadow organizations’ use of vigilante services widespread (see Anderson, 2002; Mueller, 2008). The 1990s witnessed a proliferation of vigilante groups, such as the *Mungiki*, the Kalenjin Red Warriors, the Baghdad Boys and the Sabaot Land Defense Force (SLDF) in various parts of the country (Lynch, 2013a: p.170).

There are various important features that need to be highlighted here. Firstly, the proliferation of these illegal groups was not simply owing to the widening of democratic spaces (as a result of multiparty elections), but was largely facilitated by local politicians from both sides in facing stiff elections. As the elections created further competition between politicians, ‘the menu’ for mobilising supporters and creating fear among voters was supported by Moi’s use of illegal violence. As such, the widespread use of illegal violence became a political strategy for reducing

⁷² For a useful discussion about *Mungiki* and other criminal gangs in Kenya history and politics, see Henningsen and Jones, 2013; Kagwanja, 2006; 2003; Rasmussen, 2010.

international society's calls for accountability for the systematic violation of human rights (Auerbach, 2003: p.262). These uninvestigated instances of violence have impeded the contemporary call for criminal prosecution, as accountability for the crimes is evenly spread among various political barons (every leader is responsible for some form of atrocity), which serves to perpetuate the cycle of impunity (Cheeseman, 2011: p.352).

Secondly, most of these illegal non-state actors performed vigilante and 'welfare' functions, including meting out illegal forms of punishment against members of the Kenyan population who lived within their own 'shadow territories' that were not under the fully observation of state enforcement officers, such as the Kibera slums. These actors also collaborated with certain high-ranking individuals within the police force (Henningsen and Jones, 2013: p.380).

Thirdly, the process of political liberalisation produced illiberal democratic practices and increased the economic potentiality of crime features, as well as the growth of the black market and shadow activities beyond the state's surveillance (Njeru, 2013; Adams et al., 2013; Thieme, 2013). Since the 1990s, the state has continuously failed to ensure public security, to facilitate growing economic activity and to curb youth unemployment and living costs. This has transformed some of the aforementioned illegal groups and led to the creation of new groups, who perform anything from the simple task of bidding politicians' contracts during elections; to transnational, crimes, such as weapons and drugs smuggling and human trafficking (Lynch, 2013a; LeBas, 2013; Muhammad et al., 2013).

To a certain extent, these criminal gangs are connected to more radical organisations; such as *Al-Shabaab*, with its links to *Al-Qaeda*, and Somali pirates in the Indian Ocean (interview with a former *Mungiki* member, Nairobi, March 2, 2012). For instance, the increased demand among Kikuyu politicians for illegal domestic groups like the *Mungiki* is dependent on the ability of more radical and transnational groups like *Al-Shabaab* to supply weapons for domestic use (interview with the US Embassy officer, no. 2. Nairobi, March 4, 2012).

While the government has failed to investigate such connections, and indeed denies their existence (interview with local MP, no. 1, Central Provinces, March 12, 2012), the author's daily interactions with several former *Mungiki* members in the *Matatu* (taxi) industry confirm that there is a line of informal communication between both groups (the *Mungiki* and *Al-Shabaab*) in order to maintain supply lines for drugs and light weapons. These items are purchased in cross-border regions at illegal markets, controlled by other militant groups affiliated with *Al-Shabaab* (interview with a former *Mungiki* member, Nairobi, March 2, 2012). To date, the relationship between these groups has been based around the minimal⁷³ function of securing weapons, rather than of collaborating in unleashing violence against the civilian population and the government (Muthoni, 2011: p.177).

⁷³ While both the *Mungiki* and *Al-Shabaab* share radical features, factors such as the prevalence of ethnic politics, religious differences and various political motives in their leadership have likely prevented them from actively collaborating.

iii) The Third and Fourth Republics: President Mwai Kibaki (2003-2007), and the Flawed Power Sharing Coalition with Prime Minister Rahila Odinga (2007-2013).

What began as the normalisation of violence in the Moi and Kibaki administrations (2003-2007) evolved into the criminalisation of violence during the Kibaki-Odinga (2008-2013), which blurs the boundary between lawful violence (that which is imposed by state institutions) and unlawful violence (which is that imposed by criminal gangs) (Lynch, 2013a: p.172). The shift from single to multiparty elections and the 2002 regime change from KANU to NARC served to perpetuate the false dream of economic prosperity and development (Joseph, 2013: p.325). The increase in political and economical liberalisations since 2003 has created the popular belief among Kenyans in the importance of accumulating wealth to obtain individual self-mastery. Likewise, many Kenyans believe that political success can be obtained through large economic growth and material development per se.

Lynch observes that Pentecostal preachers in Kenya place a particular emphasis on individual self-mastery through focus and concentration, using terms like ‘prosperity, self-resistance and wealth’ to signify a better Christian ‘status’ (2013: p.117). Far from motivating Kenyans to be productive in developing the nation, the limited legal means of accumulating wealth and the increase in the unemployment rate has strengthened a culture of political patronage and alliances, in which the ‘big man’ is relied upon to fund electoral campaigns and hire criminal gangs (Mati, 2013: pp.246-250). As a result, the intertwining of democratisation and corruption perpetuates the cycle of impunity, as the country’s corrupt legal institutions have either purposefully or neglectfully failed to hold top ministers in Moi’s and Kibaki’s administrations

accountable (Mwangi, 2008: p.283). Indeed, those who were appointed as anti-corruption tsars were threatened with murder (see Wrong, 2010).

Furthermore, the failure of the 2005 constitutional referendum and the NARC government's preoccupation with power wrangling ensured the failure of the Kibaki administration to demolish the repressive state system and its association with the systematic violation of human rights (Ghai, 2008: p.222). The country has witnessed the repeated high-profile economic crimes of the 'Goldenberg' scandal between 1991 and 1993, and the 'Anglo-Leasing' scandal of 2003 during the tenure of Kibaki. Both scandals involved top profile politicians under protection of the government, and involved the illegal payment of the taxpayer's money (36 million and 740 million US dollars respectively) for non-existent contracts (Harrington and Manji, 2013: p.17).

These scandals can be viewed as manifestations of the fact that what initially appeared as liberalisation and the promise of a better future created a heightened sense of socio-economical insecurity among politicians, as the stolen money from the scandals were in part used to fund both KANU's and the NARC's acts of patronage and their criminal gangs during the 1997 and 2007 election campaigns (Mwangi, 2008: p.284). While Kenya has enjoyed a better prospect of economic growth since 2002 (Hope, 2012: p.5), the limited economic opportunity of the formal market, uneven development, a wider gap of inequality across ethnic lines, an increase in youth unemployment and the growth of new illegal settlements and slums in Nairobi have increased the involvement of young people in criminal gangs. For these individuals, violence is a 'means to express political frustration' about the better

economic position of communities when they received direct patronage in the form of resources from the incumbents (Lynch, 2013a: p.174).

Such frustrations were also reinforced by the existing ‘perception’ that others (members of communities that directly benefitted from the incumbents, owing to the ethnicity of their citizens) do not deserve to hold a proper economic position (Lynch and Anderson, 2013: p.99). Thus, while political liberalisation of the early 1990s increased the contemporary and individual’s focus on wealth and prosperity, such elusive dreams encouraged the accumulation of wealth by criminal means due to greater rate of unemployment and limited official economic opportunity for everyone. What matters here is that democracy’s failure to prevent the recurring cycles of violence during the alternation of power reveals the ironical relationship that developed between democracy and the diffusion of violence, and the extent of the spread of criminal activity during the post-election violence.

Violence, as illustrated by Peter Kagwanja, can be separated into three interrelated categories (2009: p.365). The first category is that of spontaneous violence in ethnically mixed urban constituencies as a consequence of the increasing interference of criminal gangs. The second category is that of violence organized by the powerful elites, who exploit the beliefs of their fanatic supporters and blame their loss of the election on the supporters of their opponents. This resulted in large-scale massacres and the displacement of inhabitants of the Rift Valley to other provinces. The final category is that of widespread, discriminate killings and rapes perpetrated by security forces (2009: p.369). Rather than simply typifying instances of the latter category as mere electoral violence, it is important to consider how this kind of violence

performed a “crime inducing” function; the fact that it was facilitated by the state raised legal and political questions about how to ascertain the facts in a crimes against humanity case based on the individual responsibility per se of the ICC’s suspects.

In the increasingly hostile nature of the International Criminal Court (ICC)’s prosecution and indictment of the African leaders, some skeptics of the system of criminality of the ICC (Chapter 6) have criticised the court in relation to the ongoing debate concerning the focus on individual responsibility in state crime, post-conflict tribunals. These skeptics have objected that the ICC’s focus on individual responsibility is too simplistic, and that it does not consider the collective responsibility of state institutions for allowing such crimes to be perpetrated in the first place (see White, 2009). Here, the factors that distance international crime from ordinary crime in the eyes of a municipal court are the political motives and the ‘systematic’ nature of the former (Lee, 2010: p.17). Yet one cannot establish a case to prosecute crimes against humanity on the sole basis of individual responsibility without linking the systematic nature of such crimes to the state apparatus that allowed them to be committed. The inherently criminal features of this kind of violence also question the nature of democratisation in Kenya.

IV) The Fallacy of Democratic ‘Sequencing’

Various commentators have distinguished between procedural and substantive democratic processes that have been executed since the 1990s (Ake, 1991; Burnell, 1998; Chabal, 1998; Diamond et al., 1995; Haynes, 1993; Joseph, 1997a; McFerson, 1992). Studies of various political parties have identified the element of ‘clientelism’ in the politics of multiparty periods (Barkan, 2000; Udombana, 2002). Since the

election process (for procedural democracy) came to be regarded as a zero-sum game, the clientelist parties have come to be associated with vicious party formations, as has been ascertained by voting statistics for ethnic minority communities (Bratton et al., 2004; Lindberg, 2003; 2004; Young, 2004a).

Kenya has witnessed the repeated formation and dissolution of ‘briefcase political parties’, which featured ‘politicians shifting parties in every election since 1963 and had all one time served in government or opposition together’ (Kagwanja and Southall, 2010: p.11). For instance, Kibaki (2003-2013) had previously been appointed as Moi’s vice president (1978-1988) before he resigned from KANU (1988), going on to create his own party and later defeat Moi’s chosen successor (Uhurru Kenyatta) in the 2002 elections with NARC. Likewise, Rahila Odinga’s father (Oginga Odinga) was appointed as Kenyatta’s vice president (1964) during the *de facto*⁷⁴ single-party period (1964-1981), before he resigned from KANU (1965) and won the 1966 by-election with his socialist party. Rahila Odinga had previously served as KANU’s secretary general and cabinet minister (after the 1997 election) during Moi’s final term (1997-2002). He later joined Kibaki in the 2002 election, breaking from the NARC government after the failure of the 2005 constitutional referendum. Kibaki (PNU) and Odinga (ODM) were opponents in the 2007 election; the same is true of the current President Uhurru Kenyatta and his vice-president William Ruto (2013). Uhurru Kenyatta retained his leadership of KANU after losing his presidency bid in the 2002 election. However, he later joined his former enemy, Kibaki, in the newly formed PNU (2007). Meanwhile, Ruto (formerly of Moi’s

⁷⁴ The single-party period in Kenyan history can be separated into two main periods. The first is the *de facto* period, under the leadership of Kenyatta, ending with his death. When Moi took over the presidency (1978), he retained the *de facto* status quo until he amended the constitution and led Kenya into a *de jure* (official) single-party period in 1982. This transition was enacted as a result of the failed military coup of the same year.

KANU) joined Odinga's ODM in the 2007 election. The ICC's indictment against both Uhurru and Ruto brought them closer together, as did the formation of the Jubilee alliance against Odinga's ODM in the 2013 elections (Chaisty et al., 2014: p.7; Lynch and Zgonec-Rozej, 2013: p.9).

A procedural focus on democratic studies has raised concerns about the substantive significance of democracy in Kenya (see also Lynch and Crawford, 2011). Advocates of democracy falsely assumed that the return of the multiparty system in 1991 would be permanent (for example, see Dunn, 1996; Karatnycky, 1999; Nodia, 2002), and that fair multiparty elections would serve as a form of conflict management (Chris, 2009: p.40). Such a misleading hypothesis ignored the fact that the single-party period had limited Kenya's actual electoral experience (Kihoro, 2005: pp.161-180). Rather than representing a democratic transition, electoral politics became the leitmotif of both Kenyatta and Moi in their efforts to retain their powers. When Kenya returned to a multiparty system, elections became a "Pandora's box"; the accompaniment of voting with violence exacerbated existing civil tensions. Moi's widespread use of intimidation in the 1979, 1983 and 1988 single-party elections continued unabated, even after the introduction of the multiparty system in 1991 (Mueller, 2011: p.99).

Democracy in Kenya is subject to scrutiny because the democratic struggles only indicate a procedural approach to politics; it lacks a substantive foundation, or a firm connection to the masses (Ogude, 2002: p.205). The understanding of 'substantive' here relates to the extent to which the democratic process empowers the masses, rather than exploits them. A multiparty system without an agenda of empowerment

often constitutes a unstable, procedural democratic experiment. This questions the origins of the wave of liberalisation in the 1990s (Ajulu, 2002: p.253).

The erosion of the authoritarian regime, the failure of economic policies and the advent of the constitutional crisis not only explain the demand for democracy; they can also be viewed as the launching pads for Kenya's journey into illiberal democracy in the 1990s (Bratton and Mattes, 2001: p.470). As revenue declined and debt increased, Moi's patrons began to lose the political means to sustain themselves; this created a situation in which the search for patronage resources became complicated. To escape this predicament, President Moi sought foreign aid by accepting SAP (Brown, 2001: p.725). These external and internal forces inaugurated Kenya's return to multiparty elections, and became a form of 'political bribery' for securing more foreign aid and maintaining the false promise of good governance (p.727). In such instances, political reform was conducted solely as an experiment in procedural democracy, as more elections meant more foreign aid.

Meanwhile, the opposition perceived the return of multiparty elections as an opportunity to gain power. Pushing for multiparty elections became a political gimmick for ousting Moi from power (Oloo, 2007: p.28). This accounts for why the return of the multiparty system saw an enormous increase in the registration of opposition candidates, who failed to unite under the banner of the democracy that they had previously fought for. The Forum for Restoration of Democracy (FORD), which began as a single opposition, was divided. This provided KANU with a better prospect of retaining its seats in the 1992 and 1997 elections.

Ghandi and Prezowski propose a novel explanation as to why a dictator provides legislative opportunities while simultaneously refusing to step down (2006: p.15). Electoral and legislative changes create opportunities for future opponents to co-operate to a limited extent in joining the government after the election. Inevitably, it weakens the opposition's voice, as occurred in the 1992 and 1997 elections. It can also lead to a state of rule without opposition, as was witnessed in the GNU (2008-2013).

The democratic experiment in 1990s Kenya can be viewed as a manifestation of Moi's reluctance to step down, and of the democratic opportunists' obsession with obtaining patronage resources. The multiparty system features all the greed, grievances and struggles of the previous political regimes; the election becomes an instrument for defeating ethnic opponents, without being genuinely representative of all Kenyans. Such a flawed democratic project generates widespread violent activity, as the democratic process (1992-2013) provided an opportunity for the political elite to hijack the political transition. The violence that precedes an election constitutes irrefutable evidence of the 'sequencing democracy fallacy', in which the incumbent impedes the democratic process by refusing to step down (see Carothers, 2007; Mansfield and Snyder, 2007).

Since elections were unavoidable after the return of the multiparty system, the democratic process was undermined by ethnic barons in order to prevent the public from interfering with their obsession with the alternation of power holding (Bratton and Walle, 1997: p.202). Thus, the undemocratic measures became more complex and vicious, as the competition for patronage resources was constrained by pressure from

the domestic and international audience to institute reforms and to address human rights violations and impunity (Mueller, 2011: p.97). In such a scenario, if the incumbent fails to prevent a majority vote in favor of the opposition, or if he fails to remain in power by ‘stealing’ the election, then the establishment of a power-sharing government is unavoidable. This continues to occur because new democracies lack effective social contracts for opposing illegitimate violence, thus inviting political upheaval as the only means of opposing the corrupt behavior of the state. Branch and Cheeseman describe the dilemma as a ‘widespread malaise within democratisation’(Branch and Cheeseman, 2009: p.24). It was against this backdrop that violence broke out in the wake of the electoral crisis of 2007.

C – Understanding the Crisis in Kenya: Post-election Violence and Transitional Justice

Several characteristics derived from the above analysis are particularly important in exploring justice- and reconciliation-seeking policies. These characteristics shall be discussed as follows:

D) On the Nature of Political Violence and the Scope of Transitional Justice in Kenya

The electoral crisis ‘tapped into an atavistic vein of tribal tension that always lay beneath the surface of Kenya but until now had not produced widespread mayhem’ (Gettleman, 2008). While the upsurge of electoral violence since the 1990s had structured the predominant theme of post-Cold War Kenyan politics, it is in fact a mistake to ignore the historical reality that existed before the 2008 crisis. Besides electoral types of violence, the country had previously been scarred by political violence of various hues; a significant majority had already been widely affected by

the displacement and instabilities incurred by civil war since the formation of the colonial state in Kenya. While recent political violence in the form of electoral crises was significant and real enough, they cannot easily be identified as relatively more destructive or characteristically more unique than the various types of violence that have occurred throughout the history of the country. As such, to put the matter succinctly, while this thesis has focused specifically on the 2008 electoral crisis, the above discussion indicates that violence has been used as a principal instrument for the creation and consolidation of the authority of the state in Kenya throughout its history. Simultaneously, however, those who wished to challenge the state's authority also regularly resorted to violence against the state.

In this thesis, analysing violence in Kenya is consistent with the innovative and persuasive logic of violence proposed by Sathis Kalyvas (2006). According to Kalyvas, the superficial analysis of violence has been easily identified as an anomaly of peacetime politics. It has been marred by the consequential bias of drawing binary yet obscure distinctions between war and peace in international law research, and equates an additional research inquiry into civil war, for instance, with the violence perpetrated as a result of politics or crime (p.15). In Chapter 2, I largely agreed with Galtung's provocative ideas concerning negative peace in order to formulate an understanding of the problematic and dialectic relations between peace and conflict, which feeds into Richmond's criticism of the dangers of relying on the binary distinction between war and peace in IR scholarship. What is interesting here is that Kalyvas provides a similar response with particular attention paid to the impact of the problem of simply accepting violence as a product of war that is separate from

peacetime politics upon the international legal response to crimes that are committed solely in response to violence.

The danger of ignoring the fact that crimes that are committed as a result of political violence are also connected to negative peacetime conditions has recently been raised by one of the most celebrated professors of African politics and history, David Anderson. According to Anderson, there is a significant danger of distinguishing peacetime politics from violence decades into the future projection of the politics of peace in Eastern Africa (Anderson and Rolandsen, 2014: p.544).

As Anderson points out, most researchers have failed to recognise that such a binary distinction in the case of Kenya creates conceptual bias or flawed presuppositions in analytically investigating the instances of structural violence or negative peace that occurred during peacetime. It also muddies the analysis of the criminal features of maintaining peace through political repression, extrajudicial homicide, and systematic violation of human rights (p.545). Accordingly, violence tells us more about social relationships, power and the shifting of character, as well as agency and structure. Consequent to this presupposition is the significance of locating the focus of transitional justice in Kenya on unspeakable crimes committed or perpetuated by the actors during negative peacetime, or without the occurrence of 'liberal' regime change. This allows us to observe the political characters of the ICC's primary suspects or 'big fish'. As is discussed in Chapter 4, these figures preached peace in the public arena as a pretext for denying the ICC access to retributive justice.

Understanding the nature of political violence in Kenya as a combination of colonial legacy, international and regional contingencies and products of Kenya's own agents is key to illuminating why the predominant agenda of building transitional justice institutions and debates in Kenya revolves around the political idea of reforming political institutions, bringing them out of their entrenched culture of impunity rather than initiating a linear liberal transition. To borrow the book title of one of the most renowned Kenyan legal scholars, Makau Mutua (2008), the process can be described as 'taming the leviathan'. As such, the global transitional justice discourses were specifically tailored to a particular local milieu of Kenya, utilising various transitional justice mechanisms as modes of judicial statecraft in an age in which the ICC interacts increasingly with Africa and other hostile regions that have witnessed violence alongside a removal of effective justice measures or impunity.

II) Transitional Justice is not Necessarily a Historical Injustice: A Specific Focus on Post-election Violence

Simultaneously, however, while the above analysis has explored the continued pattern of violation or unspeakable crimes beyond the recent episodes of the electoral crisis of 2008, it is unrealistic to propose a transitional justice agenda to probe the ability of each institution to address historical injustice. Indeed, the Truth, Justice and Reconciliation Commission (TJRC) hinted at this issue when it recognised its limited capacity to address historical injustice despite the ambitious nature of the commission's jurisdiction to cover a broad scope of violations that have occurred throughout Kenya's history (T.J.R.C., 2013, Vol. 1, pp.55-71). While the scope of the ICC's proceedings is limited to the suspects of the electoral crisis, the TJRC's attempt to document the official narrative of the atrocities that the country has witnessed since independence should not be realistically expected to cover everything within a short

periodical mandate. Rather, it should be viewed as an initiation sequence that exposes the findings to further public debate and scrutiny for future investigation and reconciliation.

In short, both organisations operated as transitional justice institutions with a particular focus on post-election violence. Any extensive debates on their findings and their relations to other long periods of historical violations or injustice are likely to spark long-term formations of permanent judicial and political institutions to address wider reparation and reconciliation concerns, rather than relying heavily on the interim mandate of transitional justice institutions. However, given that the immediate concern of both transitional justice mechanisms in Kenya is widely with addressing the needs of the victims, this thesis' focuses on the IDPs' perspectives should be considered as normatively and politically valid. This is because focusing on the victims' perspectives is one of the ways of measuring the primary ability of such transitional justice institutions to ensure the safety and dignity of the victims after the 2008 crisis. Meanwhile, there has been a considerable amount of scepticism voiced in relation to the necessity of pursuing transitional justice given the relatively small scale of the post-election violence when compared to the large-scale conflicts of the neighbouring countries of Rwanda, Burundi, Sierra Leone and South Africa. However, as Kagwanja and Southall argue, 'post-election Kenya is an intellectual minefield, more fiercely contested and perhaps riskier than the post-*Mau Mau* scholarship' (2010: p.1). This relatively small scale crisis challenges some of the major achievements that one of Africa's few stable states has made since the end of the Cold War. It has reversed the significant continental progress made in development and security; to a certain extent, it also questions Africa's position in the

international system, as well as its contribution to international security and order (see also Kiwuwa, 2013).

III) Transitional Justice Agenda on Mitigating Impunity and Strengthening Accountability

Analyses derived from the previous discussion have identified some of the major themes - such as state crisis, historical injustice, the diffusion of violence and the fallacy of the democratic sequence - that contribute to our understanding of the recurring pattern of violence and its criminalisation. The predictable yet unpreventable nature of the violence, owing to the culture of impunity and the illiberal (hybrid) democratic mode of governance (power-sharing) has transformed the debate about justice- and reconciliation-seeking policy into a politics of accountability; the primary concern among members of the incumbent regime is with which transitional justice mechanism does not 'threaten the leaders' status quo' (interview with KAF officer no. 2, Geneva, November 26, 2010).

Hence, this thesis has been written on the basis of my belief in the necessity of embarking on a journey of academic inquiry that attempts to determine the ability of transitional justice institutions to harness greater political and legal accountabilities in Kenya. Advancing the particular case of how Kenyan society is able to come to terms with the post-election violence is key to understanding the potential of cultivating accountability and mitigating impunity. While the majority of transitional justice literature has concerned itself with the thematic focus of transitional justice institutions on addressing the greatest cause of human rights discourse and clear regime change, transitional justice in Kenya should be seen as a paradigm of strengthening democratic institutions through judicial statecraft with a particular focus

on impunity and accountability, since this is what haunts the country's troubled past. Pursuing a transitional justice agenda can be seen as one of the ways to exorcise the country's past demons of violence, in particular the way the state and the ruling class orchestrated this violence through authoritarian rulings or extra-judicial killings, producing a sense of human insecurity among the country's various ethnic communities and triggering the future seeds of discord.

IV) Developing Transitional Justice Agenda and the Capacity of the State

The question of the neo-patrimonial nature of the state, and the capacity of state institutions to implement transitional justice, may have a significant impact upon justice- and reconciliation-seeking policy (see also Bosire, 2006). Such a predicament 'can further deplete the capacity of state institutions; and the nature of the transition itself and its associated compromises' (p.4). Additionally, socio-economic injustice, uneven development and corruption have been identified as causes and consequences that are explicit and implicitly intersected with the past wrongdoings of the political elite (see Greiff and Duthie, 2009).

Though structural violence and the economic nature of the conflict have been acknowledged as concerns to be resolved by the peacebuilding and reconciliation policy in Kenya, more practical dilemmas have appeared in expanding transitional justice missions to address the comprehensive grievances of post-conflict societies. One of these dilemmas is the limited potential of transitional justice mechanisms to address the long-term pursuit of land tenure reform and security in Kenya (Chapter 5). Such a predicament creates unrealistic expectations of transitional justice, which is partly due to a default resortment to an understanding of transitional justice that bears

no relation to the competency of state institutions in times of transition. It also spring from to the issue of the unclear political transitions that have been enacted in many of Africa's transitional justice experiments (minus South Africa, Rwanda and Sierra Leone). This produces what Bosires has coined as an 'overpromised and undelivered' transitional justice in Africa (2006: p.6).

D – Navigating Transitional Justice Policy after the 2008 Crisis

I) Mediating the Crisis and Power Sharing Government in Kenya

In the case of Kenya, while the facts and figures for the dead and missing may vary from one source to another, no less than 1,500 Kenyans have been killed, 600,000 have been displaced and nearly 100 billion Kenyan shillings (USD 1.5 billion) have been lost (Snow, 2009: p.116).

The violence broke out after the incumbent Kibaki was controversially declared by Electoral Commission of Kenya (ECK) as the winner of the election (Mutua, 2008: p.25). The first instances of violence were recorded as having occurred in the strongholds of the ODM. In response to the ODM's protests, supporters of Kibaki and the PNU lead by Uhuru Kenyatta later allowed the tension resulting from the election disputes to escalate into ethnic slaughter, rape and plundering. These atrocities included the mass burning of women and children in a church (see Kavulla, 2008).

The intensity of the violence between 30th December 2007 and the first two months of 2008 terrified Kenyans, as well as members of the international community who had previously benefitted from Kibaki's economic policy (Brown, 2011: p.530).

News of the post-election violence quickly spread across the world. Shocking images of a nation engulfed by violence were splashed on local and international media outlets. Yet, the protagonists at the centre of the disputed presidential election, President Mwai Kibaki of PNU and Raila Odinga of ODM (hereinafter referred to as the Principals), took hard-line positions, each insisting they had won.

The international community, with the African Union (AU) taking a lead, responded almost instantly, with all efforts channelled towards unlocking the political gridlock and bringing to cessation the violence that was steadily pushing the country towards disintegration. From January 8 and 10, 2008, then AU Chairman, His Excellency John Agyekum Kufuor, President of Ghana, visited the country and initiated a mediation process between the Principals. After he left, and with the blessings of the two Principals, the mediation process was taken over by a three-member Panel of Eminent African Personalities (hereafter referred to as the Panel) composed of three African icons: former United Nations (UN) Secretary-General Kofi Annan, former Mozambican Minister and First Lady Graça Machel and former President of the United Republic of Tanzania Benjamin Mkapa.

The Panel, chaired by Kofi Annan, arrived in Kenya on January 22, 2008 and immediately proceeded to hold meetings with relevant stakeholders. Two days later, on January 24, 2008, the Panel managed to convene a meeting between the two Principals. A few days later, on January 29, 2008, the Kenya National Dialogue and Reconciliation (KNDR) was formally launched by the Principals in the presence of the Panel.

With the Panel as mediators, the KNDR negotiations were conducted by representatives of the two opposing sides: the PNU side was represented by Cabinet ministers Martha Karua, Sam Onger, Moses Wetangula and Mutula Kilonzo, while the ODM side was represented by Musalia Mudavadi, James Orengo, William Ruto, and Sally Kosgei. The negotiating team agreed on an agenda comprising four main items (see Table 3.1).

On February 28, 2008, after 41 days of intense mediation, the formal negotiations were concluded with the signing of the Agreement on the Principles of Partnership of the Coalition Government (hereinafter referred to as the Coalition Agreement) between the Principals. Upon the signing of the Coalition Agreement the crisis ceased.

Despite the predictable and somehow preventable nature of the crisis, the donors and other mediating actors failed to learn from similar mistakes that they made during the 1992 transition, and ignored the warning signals that were visible in the failure of the 2005 referendum (Brown, 2009: p.389). As a result, they relied heavily on AU and East Africa's fragile sub-regional arrangements to coordinate the crisis mediation strategy. In short, the socio-political predicament and the active engagements of all international, regional and local stakeholders contribute to the immediate restoration of peace and the viability of power-sharing arrangements (p.396).

Arguably, Kenya's attempts to deal with post-election violence were conditioned by an international proliferation of peacebuilding, which grew out of the existing debate between power sharing and transitional justice, whilst simultaneously emerging out of

the national political reconciliation project. Of key importance was the political attempt to address human rights violations and political reforms that emerged from the implementation of the Kenyan National Dialogue and Reconciliation (KNDR) agreement.⁷⁵ The agreement marked the establishment of a power-sharing government, whereby both conflicting principals (Kibaki and Odinga) agreed to find a durable solution to the post-election violence.

The governmental tenure of the Government of National Unity (GNU) between 2008 and 2013 was specifically designed to implement four agendas (see Table 3.1). On the basis of the Coalition Agreement, the National Assembly enacted the National Accord and Reconciliation Act on March 18, 2008. The National Accord paved way for the establishment of a coalition government and the offices of Prime Minister as well as those of two Deputy Prime Ministers.

Table 3.1: Kenyan National Dialogue and Reconciliation Through a mediation of H. E. Kofi Annan and the Panel of Eminent African Personalities On the Resolution of the Political Crisis: Annotated Agenda Four	
At the fourth session held on 1 February 2008 under the Chairmanship of Mr. Kofi Annan, of the Panel of Eminent African Personalities, the Parties of Kenyan National Dialogue and Reconciliation on the resolution of the political crisis and its root causes, namely the Government of Kenya/Party of National Unity and the Orange Democratic Movement agreed on the following Agenda for the dialogue:	
Immediate actions to stop violence and restore fundamental rights and liberties.	<p>Both parties understand that resolving this crisis politically is a matter of immediate priority and have reiterated their commitment to finding a just and durable solution. Discussions on Agenda point 1 will be conducted to identify and agree on the modalities of implementation of immediate action aimed at:</p> <ul style="list-style-type: none"> • Stopping the wave of violence that has gripped the country since the announcement of the result of the Presidential Elections; • Enhancing the security and protection of the population and their

⁷⁵ For a detailed discussion on the diplomatic process behind the establishment of the GNU, see Juma, 2010; Mwagiru, 2008.

	<p>property;</p> <ul style="list-style-type: none"> • Restoring the respect for the sanctity of human life; • Ensuring the freedom of expression, press freedom and the right to peaceful assembly upheld;
Immediate measures to address the humanitarian crisis, promote reconciliation, healing and restoration.	<p>Discussions will be conducted to identify and agreed on modalities of implementation of immediate measures aimed at:</p> <ul style="list-style-type: none"> • Ensuring that the assistance to the affected communities and individuals is delivered more effectively; • Ensuring the impartial effective and expeditious investigation of gross and systematic violations of human rights and that those found guilty are brought to justice; • Ensuring the processes of national healing, reconciliation and restoration start at once.
On how to overcome the current political crisis	<p>Under this Agenda item, the Parties will negotiate and agree on a solution towards resolving the political crisis arising from the disputed presidential election results as well as the ensuing violence in Kenya.</p> <p>The current crisis revolves, in large measure around the issues of power and the function of state institutions, It resolution may require adjustments to the current constitutional, legal and institutional framework.</p>
On addressing long-term issues and solutions	<p>Poverty, the inequitable distribution of resources and perceptions of historical injustices and exclusion on the part of the segments of the Kenyan society constitute the underlying causes of the prevailing social tensions, instability and cycle of violence. Discussions under this Agenda item will be conducted to examine and proposed solutions for long-standing issues such as <i>inter alia</i>:</p> <ul style="list-style-type: none"> • Undertaking constitutional, legal and institutional reform • Tackling poverty and inequity, as well as combating regional development imbalances; • Tackling unemployment, particularly among the youth; • Consolidating national cohesion and unity; • Undertaking a Land Reform • Addressing transparency, accountability and impunity.
<p>Timetable The Parties agreed that Agenda items 1, 2, and 3 would be resolved within a period of</p>	

between 7 and 15 days from the date of commencement of the Dialogue, with Agenda item 4 would be resolved within a period of one year after the commencement of the Dialogue (launched on 28 January 2008)

Source: (KNDR Secretariat, Nairobi, 2008)

Due to the significant of the crisis, the negotiation team concluded a series of public agreements, (a particular focused to Agenda Items 1 to 3), laying out the agreed modalities for implementing the broader objective of the KNDR process, which was ‘to achieve sustainable peace, stability and justice in Kenya through the rule of law and respect for human rights, as follows:

- Agreed Statement on Security Measures, February 1, 2008. Under this Agreement, the parties committed themselves to take action to halt the violence. The Agreement called on the police to act in accordance with the law and to carry out their duties and responsibilities with impartiality. It called on all leaders to embrace and preach peace and further listed a range of measures to be taken towards restoring fundamental rights and civil liberties.
- Agreed Statement on Measures to Address Humanitarian Crisis, February 4, 2008. This Agreement laid out measures for the assistance and protection of internally displaced persons (IDPs). It also proposed the operationalisation of the Humanitarian Fund for Mitigation of Effects and Resettlement of Victims of Post-2007 Election Violence. With respect to immediate measures to promote reconciliation, healing and restoration, the Agreement proposed that a truth, justice and reconciliation commission that includes local and international jurists should be established.
- Agreed Statement on How to Resolve the Political Crisis, February 14, 2008. This Agreement, in the first instance, outlined a number of options that were available for resolving the political crisis, with the strengths and weaknesses

of each option. It then charted the way forward, including: a forensic audit of the electoral process; comprehensive constitutional reform; establishment of a truth, justice and reconciliation commission; and the identification and prosecution of perpetrators of post-election violence.

Following the signing of the Coalition Agreement, the Panel appointed Ambassador Oluyemi Adeniji, a former Minister of Foreign Affairs of Nigeria, to conclude negotiations on Agenda Item Four. On March 4, 2008, the following agreements were signed.

- General Principles and Parameters for the Independent Review Committee on the 2007 General Elections (IREC). Pursuant to this Agreement and the Commissions of Inquiry Act, the Independent Review Commission headed by Justice Johann Kriegler of South Africa was appointed on March 14, 2008. After conducting a forensic audit of the electoral process IREC concluded that the polling process was undetectably perverted and that the recorded and reported results were so inaccurate as to render any reasonably accurate, reliable and convincing conclusion impossible.
- General Principles and Parameters for the Commission of Inquiry into the Post Election Violence (hereafter known as the Waki Commission). This Agreement, together with the Commissions of Inquiry Act, formed the basis for the appointment of a Commission of Inquiry into Post Election Violence (CIPEV) headed by Justice Philip Waki on May 22, 2008. The CIPEV carried out investigations and issued its report in October 2008. The Report found that while the post-election violence was spontaneous in some areas, it was planned and financed in other places.

Accordingly, the KNDR is a broad and ambitious political reconciliation policy, which not only focuses on addressing post-election violence, but also attempts to reform the state structure that have provided the incentive for a continuous pattern of historical injustice since 1963. As John Githongo notes, reconciliation begins with reconciling and restoring public faith in state institutions (state-society relations) (2010: p.5). The four specific agendas, particularly agenda number four, clearly indicated KNDR's broadly defined goal of obtaining an official acknowledgement of justice- and reconciliation-seeking policy (interview with KAF officer, no. 2, Geneva, November 26, 2010).

The first agenda was achieved with the establishment of the power-sharing government of the GNU in April 2008. An amendment of the old constitution was made to allow for the creation of an interim post for the prime minister, which led to a power-sharing arrangement between President Kibaki and Prime Minister Odinga (see Table 3.2).

Table 3.2: Excerpt from The National Accord and Reconciliation Act 2008

Preamble:

There is a crisis in this country. The parties have come together in recognition of this crisis, and agree that a political solution is required.

Given the disputed elections and the divisions in the parliament and the country, neither side is able to govern without the other. The needs to be real power sharing to move the country forward.

A coalition must be partnership with commitment on both sides to govern together and push through a reform agenda for the benefit of all Kenyans.

Descriptions of the Act:

An Act of Parliament to provide for the settlement of the disputes from the presidential election of 2007, formation of a Coalition Government and Establishment of the Offices of Prime Minister, Deputy Prime Ministers and Ministers of the Government of Kenya, their functions and various matters connected with an incidental to the foregoing.

1. This Act may be cited as the National Accord and Reconciliation Act 2008.

2. This Act shall come into force upon its publication in the Kenya Gazette which shall not be later than 14 days from the date of Assent.
3. (1) There shall be a Prime Minister of the government of Kenya and two Deputy Prime Ministers who shall be appointed by the President in accordance with this section.

(2) The person to be appointed as Prime Minister shall be an elected member of the National Assembly who is the parliamentary leader of –
 - (a) The political parties that has the largest number of members in the National Assembly; or
 - (b) A coalition of political parties in the event that the leader of the political party that has the largest number of members of the national Assembly does not command the majority in the National Assembly.
(3) Each member of the coalition shall nominate one person from the elected members of the National Assembly to be appointed a Deputy Prime Minister.
4. (1) The Prime Minister:
 - a) shall have authority to coordinate and supervise the execution of the functions and affairs of the Government of Kenya including those of Ministries;
 - b) may assign any of the coordination responsibilities of his office to the Deputy Prime Ministers, as well as one of them to deputise for him;
 - c) shall perform such other duties as may be assigned to him by the President or under any written law.
(2) In the formation of the coalition government, the persons to be appointed as Ministers and Assistant Ministers from the political parties that are partners in the coalition others than President's Party, shall be nominated by the parliamentary leader of the party in the coalition. Thereafter there shall be full consultation with the President on the appointment of all Ministers.

(3) The composition of the coalition government shall at all times reflect the relative parliamentary strengths of the respective parties and shall at all time take into account the principle of portfolio balance.

(4) The Office of the Prime Minister and Deputy Prime Minister shall become vacant only if –
 - a) the holder of the office dies, resigns or ceases to be a member of the National Assembly otherwise than by reason of the dissolution of Parliament; or
 - b) the National Assembly passes a resolution which is supported by a majority of not less than seven days notice has been given declaring that the National Assembly has no confidence in the Prime Minister or Deputy Prime Minister, as the case may be; or
 - c) the coalition is dissolved.
(5) The removal of any Minister nominated by a parliamentary party of the coalition shall be made only after prior consultation and concurrence in writing with the leader of that party.
5. The Cabinet shall consist of the President, the Vice-President, the Prime Minister, the two Deputy Prime Ministers and the other Ministers.

6. The coalition shall stand dissolved if:
 - a) the Tenth Parliament is dissolved; or
 - b) the coalition parties agree in writing; or
 - c) one coalition partner withdraws from the coalition by a resolution of the highest decision-making organ of that party in writing.
7. The prime minister and deputy prime ministers shall be entitled to such salaries, allowances, benefits, privileges and emoluments as may be approved by Parliament from time to time.
8. This Act shall cease to apply upon dissolution of the tenth Parliament, if the coalition is dissolved, or a new constitution is enacted, whichever is earlier.

Source: (KNDR Secretariat, Nairobi, 2008)

The third agenda was implemented by the establishment of the Waki commission (see Table 3.3). The Waki report findings contributed to the existing debate about whether to attribute accountability through criminal or retributive justice, and to a certain extent helped to implement restorative justice through the inception of the Truth, Justice and Reconciliation Commission (TJRC). The fourth agenda contributed not only to the ICC's proceedings and the operations of the TJRC, but also to major institutional reforms. It also helped to promulgate a new constitution on August 27, 2010 (interview with the CIC officer no. 2, Nairobi, February 7, 2012).

Table 3.3: Commission of Inquiry on Post-Election Violence

Background

Recalling that the Parties have previously agreed to:

Identify and agree on the modalities of implementation of immediate measures aimed at:

- Ensuring the impartial, effective and expeditious investigation of gross and systematic violations of human rights and that those found guilty are brought to justice.

And have expressed a commitment to:

- Identification and prosecution of perpetrators of violence, including State security agents
- Addressing the issues of accountability and transparency

The Parties to the National Dialogue and Reconciliation, together with the Panel of Eminent African Personalities (The Panel), agree to the establishment of a Commission of Inquiry on Post-Election Violence (Commission of Inquiry)

This Commission of Inquiry will be non-judicial body mandated (i) to investigate the facts

and surrounding circumstances related to acts of violence that followed the 2007 Presidential Election, (ii) investigate the actions or omissions of State Security agencies during the course of the violence, and make a recommendation as necessary, and (iii) to recommend measures of a legal, political or administrative nature, as appropriate, including measures with regard to bringing to justice those persons responsible for criminal acts. The Commission of Inquiry aims to prevent any repetition of similar deeds and, in general, to eradicate impunity and promote national reconciliation in Kenya.

Key Activities

The activities of the Commission shall be:

To investigate the facts and circumstances related to the violence following the 2007 Presidential election between December 28, 2007 and February 28, 2008.

- To prepare and submit a final report containing its findings and recommendations for redress, any legal action that should be taken, and measures for future prevention.
- To prepare and submit a final report containing its findings and recommendations for redress, any legal action that should be taken, and measures for future prevention.
- To make a recommendations, as it deems appropriate, to the Truth, Justice and Reconciliation Commission.

National Cooperation

Kenyan authorities, institutions, parties and others shall fully cooperate with the Commission of Inquiry in the accomplishment of its mandate, in response to request for information, security, assistance or access in pursuing investigations, including:

- Adoption by the Government of Kenya of any measures needed for the Commission and its personnel to carry out their functions throughout the national territory with full freedom, independence and security;
- Provision by the Government of Kenya and all Kenyan State institutions of all information in its possession which the commission requests or is otherwise needed to carry out its mandate, with free access provided for the Commission and its staff to any achieves related to its mandate;
- Freedom for the Commission to obtain any information its considers relevant and to use all sources of information which it considers useful and reliable;
- Freedom for the Commission to interview, in private or any persons it judges necessary;
- Freedom for the Commission to visit any establishment of place at any time; and
- Guarantee by the Government of Kenya of full respect for the integrity, security and freedom of witnesses, experts, and any other persons who help its works;

The Parties call upon the States, relevant UN and AU bodies and, as appropriate, national and internationally respected jurists or other nongovernmental organizations to provide information to the Commission of Inquiry related to the post-election violence, to make such information available as soon as possible and to provide appropriate assistance to the Commission.

Composition

The Commission of Inquiry will be composed of three impartial, experienced and internationally respected jurists, or experts in addressing the communal conflict or ethnic violence. Two of these shall be international and one shall be Kenyan. They shall be selected by the Panel following consultation with the Government/PNU and ODM, and appointed by the President.

A Support Office, based in Nairobi and with adequate expert staff, will be established to provide support to the members of the Commission.

Methodology

The Commission of Inquiry shall develop its own work plan and procedures. These will be guided in all aspects by principles of fairness, impartiality, transparency, and good a faith.

Outputs and Timeline

The Commission of Inquiry will start its works within 30 days following the appointment of its members. It will operate for three months, with an additional month if required. At the conclusions of its work it will submit a final report of its findings and recommendations to the President of Kenya, with a copy to the Panel. Main findings of the report will be made public within 14 days of submission, although certain aspects of the report or annexes may be kept confidential in order to protect the identity of witnesses or persons accused.

Financing/Logistics

The Commission of Inquiry will be funded by the Kenyan Government and the Trust Fund for the National Dialogue and Reconciliation, including support from donor states or foundations. It will receive logistical support from the AU and the UN.

Source: (KNDR Secretariat, Nairobi, 2008)

In line with the four agendas derived from the KNDR, GNU has expressed its commitment to resolving the contentious issues that arose during the crisis with mechanisms that are commonly associated with transitional justice. However, there is an increasing amount of skepticism as to whether the KNDR can be considered as evidence of a transitional justice policy, since the country has not witnessed a substantive transition since 2003.

II) Defining Justice and Reconciliation During Transition

As a South African legal commentator has questioned:

Can we have a [transitional justice] measure within such an unclear transition? There is more eagerness among the western partners and eminent AU officials to formulate a justice-seeking policy, but obviously the power-sharing deal between Kibaki and Odinga will affect capacity building for justice and reconciliation' (interview with the IJR officer, Cape Town, July 15, 2011).

Other commentators have also raised concerns about the issue of an unclear political transition. For instance, in his assessment of power-sharing in Africa, Andreas Mehler excluded Kenya from his comparative assessments in order to determine the effect of power-sharing on sustainable peace (2009: p.468). According to Mehler, Kenya can be excluded because it does not fit into the traditional pattern of post-civil war power-

sharing and regime changes in Africa (p.468). Indeed, the predictable pattern of politics in Kenya has left many skeptics unconvinced that the measures for dealing with post-election violence can be genuinely considered as valid reasons for advocating transitional justice. It is arguable that, in Kenya, 'the more things change, the more they stay the same' (Cheeseman, 2009).

The questions raised by an unclear political transition are among the critical issues that occupy the numerous commentators trying to assess the practicality of implementing transitional justice. As Laura Ariaza and Naomi Arriaza have noted, the main problems of transitional justice imply 'a defined period of flux after which a post-transitional state sets in'(2010: p.206). Often there is the assumption that transitional justice is implemented immediately after a transitional period or a clear regime change.⁷⁶ In reality, transitions can often be protracted and unpredictable. While there is no general agreement among the commentators on a rigid definition of 'transition', scholars of comparative political studies are becoming increasingly interested in assessing the success of transitional justice measures in dealing with the past (Hazan, 2010: p.52). Ron Dudai and Hillel Cohen's work on the Israel-Palestinian conflict is indicative of this interest (2010). Both scholars have admitted that implementing transitional justice measures when the conflict is still in progress tends to raise eyebrows (p.228). However, several measures for dealing with past wrongdoings, such as those that allow both former Israeli soldiers and Palestinian militants to talk about their past atrocities, have been initiated by local NGOs (p.229). 'Many of these activities take place [under the] the radar of international observers

⁷⁶ There has been further disagreement about defining the nature of contemporary political transition in Africa. While there is a general agreement that transitional justice is a legal measure implemented following regime change, the reality of transition in post-conflict society is not linear. See Malan, 2008.

and may look surprising against the backdrop of the normally bleak report from the area' (p.330).

As Tricia Olsen, Leigh Payne and Andrew Reiter have acknowledged, there are few scholarly writings that engage with the dilemma of executing transitional justice during an unclear political transition (2010b: p.806). As a result, while there has been an increase in international engagements with the field of transitional justice, there are various unresolved questions about the political transitions that have occurred in Africa, which need to be resolved (Bosire, 2006: p.3).

An unclear political transition occurred in Kenya, and this requires a further examination of the relationship between transition and democratisation (Branch and Cheeseman, 2009; Bratton and Walle, 1994; Doepp, 1996; Joseph, 1997b; Ndegwa, 1997). While the nature of democratisation in Kenya has been greatly disputed, it is understood that a democratic process is a continual process, which may be nonlinear as well as revisable, and which affects every legal and political instrument commonly associated with democratisation (Chabal, 1998; Ndegwa, 1998). Although the extent of democratisation in Kenya has been contested, there has been greater progress in political liberalisation, and larger demands have been placed on the rule of law since 1992. This is apparent in further attempts to integrate Kenya into the international system, and to introduce liberal democratic ideas to Kenya's politics (Pinkey, 2001: p.19).

While Kenya's transition was unlikely to be affected by warlords and civil war (as was the case in neighbouring Rwanda and DRC), it had a strong one-party state

legacy, and consequently a weak opposition (Kihoro, 2005: p.147). Specifically, David Throup and Charles Hornsby argue that although the incumbent would retain control of the state, applying genuine political liberalisation was only possible by means of external pressure, which speeded the regime's acquiescence to some changes (1998: p.15). As a result, demand that post-election violence be dealt with became a 'constituent moment', in which decades of struggle for greater political and economic dispensations paved the way for a debate on building a justice- and reconciliation-seeking policy (interview with a University of Nairobi lecturer no. 2, Nairobi, March 18, 2009).

Burgis-Kasthala's recent study of the contested nature of transition in Beirut and the creation of the Special Tribunal for Lebanon (STL) has demonstrated that, while the country has not come to terms with its past by using transitional justice mechanisms in a 'systematic manner', the assassination of Rafic Hariri in 2006 provided an opportunity for the government to impose a hybrid tribunal (2013: p.504). Hence, transitional justice flourished through the domestication of international legal norms and instruments when those in power 'could not tolerate the murder of one of its own...billionaire property developer [Hariri]' (p.504). In this sense, both Lebanon and Kenya's narratives of political crisis created a sense of "novel needs" for transition, and did so by appealing to international norms (in this case, global transitional justice norms) related to their expression of peace and justice, regardless of their subjective definition of these terms.

At the same time, both countries had seriously troubled pasts, and were trapped in permanent or protracted states of transition. Meanwhile, the mode of liberal

peacebuilding that has commonly been imposed in managing conflicts such as those of Rwanda and Sierra Leone was similarly emphasized as being a viable remedy to violence during the negotiations surrounding the crisis in Kenya (interview with AU officer no. 1, Addis Ababa, April 14, 2012). The integration of transitional justice as part of the power-sharing formula in Africa's recent election disputes contributed to a situation where there was an increased and transnational pressure upon the AU to address the issues of impunity and corruption (Killander, 2012: p.213).

When the Kenyan leaders were occupied with brokering the power-sharing deal, both the UN and AU mediation teams emphasized the long-term nature of the peacebuilding agenda through transitional justice measures (fieldwork note no. 2, Nairobi, March 25, 2012). Conversely, the intellectual understanding of transitional justice at the domestic level in Kenya is evolving through key debates on peacebuilding (as is discussed in Chapter 2), as well as the changing of the national political landscape, which revolves around previous struggles for human rights and the politics of rights. In this respect, the attempts to deal with post-election violence can arguably be traced back to the fourth agenda of the KNDR agreement—that of addressing the long-term issues—and implementing a solution (see appendix 5).

Moreover, as has been suggested by Godfrey Musila, the post-election violence 'had the effect of resuscitating this [transitional justice] debate and refocusing political players on the country's troubled past' (2009a: p.449). For instance, the establishment of the TJRC on February 2009 revealed the renewed urgency of this debate, which is 'itself inseparable from the wider political context regarding...reforms' (p.449). Any political attempts to oppose such reforms 'are, by extension, opposed to any process,

including the TJRC, which would expose to scrutiny the overall structures of injustice in the country' (p.450). In such instances, the 'historical legacy, the dynamics of a coalition government and succession battles that come with it are already defining not only the 'kind' of justice but also the role of various actors' (p.451).

Nevertheless, the 1992, 2002 and 2007 elections could have been considered as political transitions if they had been followed by substantive changes (Barkan, 2011; Berman, 1998; Branch and Cheeseman, 2010; Harbeson, 1998; Murunga and Nasong'o, 2006; Long et al., 2013). The failure⁷⁷ of the 2005 constitutional project and the return of electoral violence in 2007 can be seen as indicators that the Kenyan government is concerned with preserving its status quo as a power holder. However, the focus on the four agendas in the wake of post-election violence should be seen not as a transition, but rather as a continuation of the already existing struggle for democracy and human rights in the face of the unwillingness of Kenya's ruling class to pursue political reform and justice. Kenya's attempts to deal with the post-election violence through KNDR has created a situation in which the previous national policies for addressing underdevelopment, corruption, democracy deadlock, negative ethnicity and governance intersected with the post-2008 process of debating and establishing the transitional justice policy. In this respect, it is also important to look at the milestone of transitional justice prior to the 2008 crisis in order to understand how the previous attempts to deal with human rights violations have been subverted and diverted by the ruling class.

⁷⁷ For a detailed discussion on the constitutional review project in Kenya, see Cottrell and Ghai, 2007; Mati, 2013.

III) Pioneering Transitional Justice Before the 2008 Crisis

Given the contested location of transitional justice after the 2008 crisis, it is important for us to look at the rise of human rights discourse that took place during the period of transitional politics between 1992 and 2008 (Gona, 2010: 230). This enables one to understand how the issues of human rights struggles (before 2008) and accountability that arose from the post-election violence became the face of impunity, while being simultaneously subordinate to it.

Written in the context of increasing domestic pressure being placed upon the GNU to come to terms with its past atrocities, Musila's works may provide some insightful perspectives on the past and present struggle for human rights (2009a: pp.445-64). Without considering the human rights and constitutional discourses that appeared following the political dispensation of the 1990s, it is impossible to understand the milestones in the development of transitional justice in Kenya.

The viability of transitional justice in present-day Kenya is connected to two major challenges that the country had faced in the past. Firstly, all political or legal initiatives to address the issues of rights, reforms and justice met with premature ends, or were subverted by the regimes of Moi (1978-2002) and Kibaki (2003-2013) (p.448). Various investigative and reform commissions that were either initiated by the government or by civil society succeeded only with the publication of the findings, but these were later abandoned or undermined by the government at the time (Steeves, 1997: p.32). As such, the reports that have been produced have been referred to collectively as a 'paper-protection mechanism'; the findings on paper looked promising, but the actual attempts to implement the recommendations were subverted (Musila, 2009a: p.448). For instance, the commission's findings concerning

the causes of ethnic land displacements in the Rift Valley and the Coastal Province (during the 1992 and 1997 elections respectively) were subverted by Moi. Following the publication of the findings, Moi's administration imposed legislative amendments to reduce the jurisdiction of the commission, and it was eventually disbanded following the 1997 elections (Mutua, 2001a: p.102).

Secondly, while various demands have been made for greater reforms and accountability for human rights violations, there have been several attempts by senior members of Moi's and Kibaki's administrations to reduce the momentum of the reforms agenda with various personal vendettas (Musila, 2009a: p.449). Despite numerous promises made by the government to implement reforms and anti-corruption agendas, parliament's actual imposition of laws and regulations to this effect never took place, or were simply challenged by various court injunctions on the request of individual MPs. This constitutes an abuse of power and the legal process (see Musila, 2007). The purpose was simply to buy more time, and so the process of resolving issues related to reforms, corruption, human rights and justice was often delayed until the government term ended (Mati, 2013: p.237).

Major reforms initiatives have been halted in order to pave the way for elections. For example, during the first constitutional reviews project (1995-2002) initiated by Moi, religious and civil society proposed a general amnesty (pardon) for Moi's past atrocities in return for the incorporation of bills of rights within the suggested constitutional draft (Okuku, 2002: p.90). However, several MPs diverted this course of action by proposing a truth commission with limited powers of investigation, instead of creating a stronger language of human rights through bills of rights (Juma,

2002: p.494). Of course, the project never took place, as the Moi's government was dissolved for the 2002 election.

It was only through the regime change from KANU to NARC after the election that transitional justice found its intellectual strength when Kibaki established the first TJRC task force in 2003 to gauge public opinion as to whether the truth-commission was necessary. The commission was chaired by Kenyan born legal expert Makau Mutua, who was based in New York (2004). Kibaki also appointed the renowned constitutional Professor Yash Ghai as chairman of the new constitutional project known as *Bomas* (2007), as well as John Githongo to the post of anti-corruption commissioner. In so doing, Kibaki ostensibly demonstrated his commitment to reforms and justice (see Wrong, 2010).

The results were obviously devastating, and reversed the progress that the country had hitherto made in democratisation. 'Despite ninety percent of the Kenyan population agreeing that the transitional measures were a precondition of a democratic transition, the TJRC had to be abandoned because of the hostility between Kibaki and Odinga' (Musila, 2009a: p.449). The obsession of both principals with the pre-power-sharing agreement in the NARC resulted in the failure of the 2005 constitutional referendum and the electoral violence of 2007 (Mutua, 2008: p.95).

IV) The Public Perception of Government's 'Lip Service': The Legacy of the Colonial State's Resurfaced

Given the failure of previous inquiries to address the violation of human rights, there has been a significant change in perception amongst the ordinary populace about the ruling class' unwillingness to pursue reforms and justice (interview with a local

businessman, Mombasa, February 20, 2012). During the 2002 transitions that brought the NARC to power, Kibaki's promise of transitional justice remained undelivered. The pitfall lies in the reality that the NARC did not only contain pro-reform and human rights advocates, but included former KANU politicians who defected for fear of losing their patronage resources and becoming subject to future prosecution (Lynch, 2011b: pp.183-4). Moreover, several senior politicians (including Kibaki himself) were listed in the investigation report as key suspects in the perpetration of the 1990s electoral violence (Kenya., 2004: pp.25-37).

The failure of NARC to implement its promised justice measures strengthened the populace's impression that politicians wear 'the same shoes as the colonial master' (interview with an IDP no. 24, Rift Valley, March 7, 2012). The failure to fulfil promises of justice owing to the commission's shortcomings has been connected to the colonial legacy. The works of John Ouko that deal with the effect of the Kenya Land Commission (1932-33), give a vivid impression not only of the immediate post-colonial period of land policy under Kenyatta, but also of the failure of the Colonial Office to award additional forms of land restitution or compensation⁷⁸ to those whose native land had been confiscated by the state (2002: pp.71-91).

Kenyans first learned that lesson in the early 1930s when the Kenya Land Commission, authorised by London, conducted what was the largest oral history exercise in Africa before South Africa's Truth and Reconciliation Commission. It paid scarcely any heed to its African witnesses. Their first-come land remained under late-coming, state-favoured, white farms and ranches (Lonsdale, 2008: p.310).

As Lonsdale notes, the recommendations for these forms of compensation were ignored by the Colonial Office, which generated discord with respect to post-colonial

⁷⁸ What is understood today in the literature of transitional justice as 'reparation' is not a novel phenomenon in the local context of Kenya, since the fact that material reparation for land taken by the colonial and post-colonial governments is understood as a reasonable compensation is based on mutual agreements observed by recognised arbitrators. In this case, the awarding of compensation involved both civil and criminal laws and various court cases in Kenya. See Amman and Duraipah, 2004.

land injustices. Hence, the unwillingness of the colonial office's government to compensate those whose land had been taken by the state encouraged the growth amongst the post-independence ruling class of a similar culture of reluctance to respond to official recommendations.⁷⁹

This legacy of failing to respond to the land commission's reports impacted significantly on post-colonial Kenya's structure of governance. Those in a position of state authority tended to resist any measures—including the commission's report on impunity and human rights violations—that were considered to undermine state power. Historically, the violations of human rights were intricately connected to the unlimited power of the presidency (in the old constitution), the corrupt judiciaries (appointed by the president) and the rubber stamp function of parliament (which was controlled by the president's ruling party, especially during the single-party period). This created a cycle of impunity, in which the ruling class continued to abuse their immunity and official positions, and refused to admit their abuse of power to the criminal investigation. Consequently, this helped to subvert any legal attempts to prosecute their unconstitutional behavior (Smith, 2009: p.894).

As a result, politicians were willing to use extra-judicial means of retaining power, including population displacement, torture, illegal land grabbing, forced eviction and the incitement of violence (see T.J.R.C., 2013: Vol IIA). The re-introduction of multiparty politics in the 1992 election and the regime change in that of 2002 did not prompt a more democratic or peaceful transition, nor result in suspects being made

⁷⁹ The continued legacy of impunity that can be traced back to the colonial administrative culture is not to fully blame for Kenya's colonial crisis. However, to identify this as the root of the state's resistance towards the commission's recommendations is not a novel approach. (Berman et al., 2009)

accountable for past atrocities (T.J.R.C., 2013: Vol. I, p.72). Consequently, the victims' demands for reparation for past violations remained unaddressed. When these issues were resurrected during the post-election violence, a call for political accountability and the removal of impunity (which caused the systematic violation of human rights) became the main objectives of the KNDR agenda. However, the existing political complexities in building robust transitional justice policy in Kenya were heavily conditioned as well by questionable external motives.

V) The Cautionary Tales of Transitional Justice and the External Motives of Intervention

In Africa, the return of multiparty democracies, neoliberal reforms and the process of enacting a state's transition from being a host to violent conflict to becoming the subject of justifying or having a peace process have reinforced the significance of the transitional phase (Mutua, 2008: pp.53-72). A further attempt to correct past injustices and historical violence by using transitional justice has been applauded as a pivotal step in effecting political transformation, democratic consolidation, economic growth and establishing sustainable peace in Africa (Clarke, 2009: pp.2-45).

From such assertions, transitional justice came into being as part of the human rights language employed in international campaigns against impunity, corruption, economic mismanagement and social inequality (interview with KNHRC officer no. 1, Nairobi, February 28, 2012).

Rather than simply being endorsed by international society as a part of the promotion of global human rights, the process of implementing transitional justice in Kenya has

been hijacked by many competing transnational agendas (Mutua, 2004: p.67). ‘[It is within the] active domain of policy [...and] practices by the United Nations, and supported by regional organizations, International Financial Institutions, bilateral donors, and specialized NGOs of International Centre of Transitional Justice [ICTJ] based in New York’ (Sriram, 2007: p.583). The increased involvement of the donor community, the MNCs, the IFIs, and NGOs is evidenced through their invocations of a language for human rights in their investment projects (Brown, 2009: p.400).

Since the establishment of the ICTJ’s Nairobi office in 2009, nearly 200 Western investments in tourism in Mombasa and agro-business projects in Central Province have cited the normative objectives of transitional justice as preconditions for a greater transparency in creating a friendly business environment (interview with ICTJ officer no. 1, Nairobi, February 26, 2012). During the 2012 Trade Exhibition, the EU business delegates invoked Corporate Social Responsibility (CSR)⁸⁰ alongside abstract ideas of transitional justice, which raised serious concerns among the local businessmen who had been interacting with the foreign business community for decades (interview with smallholding farmer no. 2, Rift Valley, February 25, 2012). To the local business community, while the international commitment to resolving the 2008 crisis is a welcome development, the ‘overwhelming’ and political debates surrounding the transitional justice options in Kenya have affected their business transactions with foreign business partners. The predominant business exchanges and foreign direct investments currently ongoing in the country have mostly been outsourced from the same Western countries who pushed for aid sanctions in 1992, and who have applied pressure for greater transparency since 2008. As such, the

⁸⁰ For a useful discussion on examining the relationship between Corporate Social Responsibility (CSR) and the objective of human rights and transitional justice, see Harwell and Billon, 2009.

political debate surrounding the transitional justice options have introduced a 'language' for providing the foreign business partners with additional conditions for manipulating the country's troubled legacy of human rights and constraining an equal bargain and exchange with the local business community. This means that there are less business opportunities for the local traders who rely on concluding transactions with their western business counterparts (Balistreri et al., 2009: p.678). Without dismissing the potentially positive effects that transitional justice may have on local business confidence,⁸¹ the tendency to mix the actual priority of addressing human rights violations with the execution of investment agendas has reinforced the victims' perceptions that attempts to address post-election violations through transitional justice only serve the interests of a few, particularly the power holders (interview with IDP no. 22, Rift Valley, March 2, 2012).

The increased justifications for foreign investments through the transitional justice paradigm have diverted the human rights violations narratives into profitable agendas (interview with KNHRC officer no. 2, Nairobi, March 2, 2012). The invocation of CSR within the MNCs that are concerned about human rights violations does not address the victims' demands for justice, nor does it attribute any responsibility to MNCs for the local population. The conceptual confusions of the MNCs about their human rights responsibilities has then reduced the vulnerability of the victims to being a mere matter of materialism (Radtke, 2012: p.3). As a result, the process of intervention to rescue victims is subject to the economic value of natural resources or trade opportunities that can be located within the conflict zone (Miller, 2008: p.281).

⁸¹ For a lengthy discussion of how the relationship between transitional justice and a business enterprise is affected by human rights, see Jerbi, 2009.

During the negotiation of power-sharing agendas in Kenya, the geostrategic interests of the Western donors became the crucial factor in determining the proposals of the UN, the AU and the western mediation teams (interview with an MOF official, Nairobi, March 24, 2012). Often, the MNCs and the donor community highlight the land claims⁸² of the squatters and IDPs as a justification for funding the NGOs' production of a report that will be used as the basis for a policy recommendation for the embassy in its operation of intervention and crisis mediation (interview with Kenyan NPI officer, Nairobi, March 10, 2012). As a result, the violation of human rights related to land disputes has been taken advantage of by the government and external actors, not in order to address the squatters and IDPs' land claims, but as a means of serving the MNCs' needs for land and property rights for their private investments (O'Brien, 2011: pp.17-33). The squatters' original claims of land ownership have been ignored, and the court has met with considerable difficulties in mitigating the issue, since the contested land was illegally transferred and acquired with fabricated documents that passed between local politician and the related MNCs (Junda, 2013: p.7). A further attempt to scrutinize the MNCs' fabricated land entitlement was hampered by the poor national land record, and the refusal of the district officer in Nairobi to be interviewed by the author (see also Manji., 2012; Southall, 2005). Meanwhile, the recent discovery of oilfields (Editor., 2013: p.1) in Kenya has led to an increase in the attempts of the Vancouver-based company, Vanoil Energy, to persuade the Canadian Foreign Office to direct its diplomatic missions towards assisting the Kenyan government in its legal mitigation of land disputes. The area in question is near to the future oil refinery hub, which has been named the Lamu

⁸² For a detailed discussion on the relationship between land tenure reforms and transitional justice, see Huggins, 2009b.

Port-South Sudan-Ethiopia Transit Corridor (LAPSSET)⁸³ project (interview with Kenyan government officer; Nairobi, March 18, 2012). These land disputes are connected to the squatters' claims that their land was illegally acquired by politicians and Vanoil Energy (interview with local squatter; Nairobi, April 3, 2012).

On the one hand, Western diplomatic missions have emphasised the importance of the narratives of human rights violations and the atrocities of post-election violence *vis-à-vis* transitional justice; on the other hand, the MNCs have taken advantage of human rights agendas in order to secure investment projects (interview with local MP no. 1, Central Provinces, March 12, 2012). In other words, the invocation of transitional justice is a process driven by the calculations of local politicians *and* by transnational profitable considerations.

The transformation of human rights violations into private investment agendas has contributed to the creation of a predicament in which a discourse on violations becomes an instrument for intervention that serves the interests of the MNCs and the African elite, but not the victims (see also Bachmann and Honke, 2009; Bachmann, 2012). If the external prescription for addressing human rights violations *vis-à-vis* transitional justice is taken with the AU's liberal peace formula in drafting the power sharing agreement, the problematic possibility arises that the effect of power sharing could limit the implementation of transitional justice policy on a local level.

⁸³ LAPSSET is the Lamu's regional trade corridor that encompasses several hubs, including oil pipelines from neighboring countries. The discovery of new oilfields within the corridor's boundaries is certain to trigger the development of Kenya's first oilfield at Bargoni; the nearby land areas have been historically associated with several land disputes by the squatters displaced by post-election violence. The oil discovery has led to the first oil exploration contract between Vanoil Energy and the Kenyan government. There is a serious concern among the locals that the contract excludes the Bargoni residents' future land claims, (fieldwork note no. 2, Rift Valley, March 25, 2012).

As mentioned, the liberal mode of peacebuilding in Africa has produced what Taylor defines as a 'virtual peace', which only satisfies the interests of the donors and the domestic African elites, but which is not strongly connected to the interests of the ordinary populace (2007: p.158). As a result of this virtual peace, the enforcement of transitional justice as part of the power-sharing deal has only produced a 'fiction of justice', which has arguably only served the interests of the local elite and transnational actors; however, it has not met the international expectations for the rules of law in post-conflict society, nor the victim's demands for justice (Clarke, 2009: p.40).

For the Western donors, as long as the country remains generally stable, there is no reason 'to rock the boat' (interview with Canadian High Commission officer, Nairobi, March 6, 2012). However, the US Embassy officer admitted that 'the ICC interventions have further complicated the US' official stance in balancing a call for justice [in Kenya] with the US' position as a non-party to the Rome Statute convention' (interview with US embassy officer; Nairobi, March 4, 2012).

While the increase in private foreign business interests in Kenya's human rights records has complicated the transitional justice debate, a local political attempt to broaden the debate has skewed the process of establishing coherent justice- and reconciliation-seeking policies.

VI) Flawed Options Between Criminal Prosecution or Truth Commission: The Politics of Accountability within the Government Circles

Following the establishment of the KNDR, the initial attempt to deal with post-election violence was made with the establishment of the Waki Commission, which was responsible for investigating the facts surrounding the violence. By October 2008, the commission had concluded its report, and had recommended legal measure for prosecuting those who orchestrated the violence through the establishment of a domestic special/hybrid tribunal (Waki, 2009: p.18). Learning from the failure of previous commission reports, the commission activated a self-enforcing mechanism⁸⁴, promptly handing over the boxes of evidence and the names of twelve Kenyan individuals suspected of being directly responsible for the post-election violence (Sriram. and Brown, 2012: p.224). The recipient of the boxes was Kofi Annan, who chaired the AU mediation team in negotiating the establishment of the power-sharing government in Kenya. The Waki report was made easily accessible to the public, but the twelve suspects' names were withheld. This juxtaposition in the release of information can be explained by two main concerns.

Firstly, the suspects' names served as a pre-emptive threat to both the factions of Kibaki and Odinga (interview with AU officer no. 2, Addis Ababa, April 15, 2012). None of the politicians from either faction could be seen to have any knowledge as to who had been listed as a suspect, as this would have placed them under immense

⁸⁴ In the literature of the ICC, there is has been a great deal of discussion on the concept of positive complementary. To strike a balance between state sovereignty and international intervention, the term 'positive complementary' denotes the extent to which court jurisdiction compliments national processes. The court also has a responsibility to ensure the municipal process of prosecuting the suspects is conducted in accordance with international laws and norms. Waki's self-enforcement may be read as positive complimentary, since failure to establish the domestic tribunal was followed by the ICC's intervention. See Lionel, 2013.

pressure to pursue justice in a limited time frame. The government's failure to co-operate in establishing a special domestic tribunal provided the Waki Commission with a valid justification for handing over the sealed envelope to Kofi Annan. Secondly, the commission chose to hand the sealed envelope directly to Kofi Annan, rather than submit it to the Office of the Prosecutor (OTP) of the ICC. This increased pressure on Annan to create a special tribunal, since none of the Kenyan politicians had enough confidence in the local court's ability to provide justice. Instead, they placed their faith in the AU mediation team chaired by Annan as the most likely means with which to establish a power-sharing government (interview with the KAF officer no. 1, Geneva, November 25, 2010).

The commission's symbolic handing over of the sealed envelope to Annan as a strategy for securing the local tribunal also served as a means of avoiding the consequences of the ICC's intervention, as the jurisdiction of the ICC extended beyond the influence of Kenya's ruling class (interview with the IJR officer, Cape Town, July 15, 2011). By passing the envelope to Annan, the Waki commission also signaled its disappointment in the fact that Annan had failed to secure the domestic special tribunal, despite having been directly responsible for negotiating the power-sharing government and its agenda for addressing the causes of the post-election violence.⁸⁵

⁸⁵ The agenda for addressing the post-election violence was made substantively possible through the active engagement of Annan. Hence, the creation of the Waki Commission and the recommendations of the ICC had to be made through the authority of Annan after the failure of the commission to secure the local special tribunal. By doing so, the politicians could not question the legitimacy of the recommendations for criminal prosecution, as the recommendation of the commission came into force through the power-sharing government mediated by Annan.

However, Annan did not immediately pass the sealed envelope to the OTP. Instead, he granted an additional third deadline after two previous extensions of the original (see Chapter 4). Realising that the Kenyan government had no further intention of keeping their promise to pursue justice⁸⁶, Annan then passed the sealed envelope to the OTP (Rice, 2009). A consequence of this self-enforcing mechanism was to situate the ICC as a plausible authority. As Kenya is a signatory of the Rome Statute, it is legally obliged to create internationally recognised judicial measures for prosecuting any crimes defined by the statute, on pain of facing an ICC intervention.⁸⁷ The domestic special tribunal, given its similar features to the SCSL (Sierra Leone) and ICTR (Rwanda) was expected to resolve the issue of poor domestic judicial capacity, and was regarded as the best solution for meeting the victims' demands for retributive justice (Murithi, 2010: pp.97-8). However, this tribunal was never created and on February 6, 2009, a parliamentary bill to establish the local tribunal was rejected by MPs (Wanjuro, 2009: p.1).

Sriram and Brown have explained that, despite acknowledgements of the critical implementation of the Waki reports, the MPs voted against it for various reasons. One of these was their belief that, once created, the tribunal might have become ineffective, as had occurred in the ICTR (2012: p.225). Politicians also believed that either themselves or their allies might be prosecuted, and that the proceedings could take many years. This was the case in the ICTY (Former Yugoslavia) (p.225). At the same time, the OTP extensively engaged with the GNU, attempting to convince them

⁸⁶ The government's promise of delivering justice through a local tribunal as part of the political ploy to delay the ICC's investigation in Kenya was proved to be singularly empty (interview with AU officer no. 2, Addis Ababa, April 15, 2012).

⁸⁷ The ICC's central aim is to support the post-conflict criminal tribunal. On the grounds of insufficient evidence of the post-conflict regime's having a strong judicial capacity, the court has been authorised to intervene, see Mendes, 2010.

of the importance of initiating the special tribunal proceedings. In this way, further ICC interventions could be avoided (Office of the Prosecutor (I.C.C.), 2009a).

Disappointed with the empty commitments made by the GNU senior officials, Annan passed on Waki's sealed envelope and evidence to the office of the ICC's Chief Prosecutor, Luis Moreno Ocampo, in July 2009 (Office of the Prosecutor, 2009). Following these incidents, the Kibaki administration abandoned further attempts to establish the domestic special tribunal, and declared that it would first focus on judicial and policing reforms (Wanjuro, 2009: p.1). However, the announcement of the Kibaki administration was met with vociferous criticism, as a result of the succession of failures that the TJRC task force had met with since 2003.

In September 2009, the ICC's prosecutor announced that he would pursue the investigation of the suspected perpetrators (Office of the Prosecutor (I.C.C.), 2009b). In response to this development, the government backbench MPs introduced a revised bill on the special tribunal as a private individual motion in November 2009, which was later boycotted by the majority of MPs (Jane, 2010: p.1). Meanwhile, the motives and the appointment of the TJRC raised eyebrows in light of the debate concerning a suitable method of trial for the perpetrators of post-election violence, and whether or not to focus on a restorative justice agenda (interview with TJRC officer no. 1, Nairobi, February 5, 2012).

Having considered the failure to establish the special tribunal, an immediate establishment of the TJRC was owing to the lack of a coherent justice—and reconciliation—seeking policy (Chapter 5). In such instances, the debate concerning

the best measure for dealing with post-election violence was hampered by the politicisation of the accountability measures. From the above discussion, it can be further suggested that the pursuit of transitional justice has been carried out in a divisive political environment (interview with TJRC officer no. 2, Nairobi, February 6, 2012). As Musila points out, whether in relation to ICC's proceedings, the special tribunal or the TJRC, the debate surrounding the measures for dealing with post-election violence has been politically conducted in isolation (2009a: p.445). Thus, it has provided a false start for transitional justice options; these options are summarised below.

Firstly, a choice between two types of the aforementioned transitional justice mechanisms (ICC and TJRC) forms the basis for what has been identified in Chapter 1 as a debate between peace and justice; a choice between amnesty (TJRC) or the prosecution of 'the big fish' (ICC) (Kenyan Human Rights Commission, 2010: p.23). Such a deadlock in discussion reflects the ongoing acrimony between the two major factions (PNU and ODM) of the GNU, which has almost certainly affected the formation of a coherent justice-and reconciliation-seeking policy.

Secondly, top-profile political and cabinet meetings held in an attempt to reach a decision about coming to terms with post-election violence have been conducted in a divisive political environment, and have affected the structure of national debates on reconciliation and unity (Musila, 2009a: p.450). This debate approaches the notion of justice from the perspective of contested and contentious ideas of negative ethnicity and the punishment of political opponents. At the incipient stages of defining a suitable mechanism, this public debate has been almost entirely preoccupied with the

personal leadership crisis between Kibaki and Odinga and their power-sharing deals, rather than the immediate need to resolve the humanitarian crisis, population displacement and inter-ethnic animosity (Southall Consultation, 2010: p.15).

Thirdly, approaching transitional justice as an instrument for pursuing various political agendas, the PNU faction dominated the cabinet discussion on KNDR and opted for the TJRC without the majority support of the ODM faction, which opted for criminal prosecution (Musila, 2009a: p.50). Rather than representing the PNU and ODM's collective commitment to justice and reconciliation, the public perceived that the competition between Marta Karua's (Minister of Justice, PNU) proposal for TJRC, and Prime Minister Odinga's (ODM) defeated bill for the establishment of the special tribunal reflected the polarised ethnic barons' agenda for justice.

The PNU, which were declared as the winner of the election, opted for amnesty in the form of the TJRC. They may have done so to safeguard their positions, whereas members of the ODM (which lost the election) preferred punishment to carrying out a personal vendetta against the PNU (interview with the US Embassy officer, Nairobi, March 4, 2012). This delayed the immediate need for national reconciliation. Finally, as the majority of Kenyans desire justice, especially those who were profoundly affected by the violence, justice within the national sphere seems to have become highly politicised, and has come to be defined by the fictional narratives of ethnicity-based justice (Musila, 2009a: p.50); ODM voters demand prosecution, and Kalenjin and Luo communities are perceived as being witch-hunters of PNU voters, predominantly those from the Kikuyu community (Southall Consultation, 2009: p.24).

As a result, the GNU is unable to determine what kinds of justice measures are best for Kenya.

Given the extensive ‘politicking’ attempts by the ruling class in Kenya to hinder the pursuit of justice, it is essential to briefly explore the critical position of civil society. While their presents in championing the discourse of political rights and civil liberties continued to be seen as an imperative in maximising the impacts of seeking justice and reconciliation, what will be argued next is the existing political debates concerning transitional justice among the ruling class in Kenya have somehow conditioned the limited operations for the civil society, thereby creates cacophony among local civil society during the contemporary judicial-civil attempts of limiting the ruling class’ politicking of transitional justice.

VII) The Role of the Civil Society (CSO) in Transitional Justice Agenda: Critical but Unconstructive?

Within the literature of transitional justice, the position of Civil Society Organisations (CSOs) is often recognised and cited as crucially critical and yet ambiguous in either influencing the national transitional justice agenda or increasing the public pressures upon the incumbent regime to implement the final report of the truth commissions (Rubin, 2014: p.98). This was not only highlighted by the few of the world mostly recognised truth commissions, such as the Argentina’s National Commission on the Disappearance of Person (Crenzel, 2011: p.75.) and the South Africa’s TRC (Verdoolaege, 2006: p.75.), but as well appreciated by Priscilla Hayner, in reporting the works of various truth commissions across the globe since 1974,

the strength of civil society in any given country . . . will help determine the success of any truth commission. Because of their ability to generate public pressure to push for a strong commission, and because of their information, contacts, and experience

in human rights monitoring, the contribution of non-governmental organisations (NGOs) can be critical. Yet despite the evident opportunities, the relations between truth commissions and NGOs have sometimes been strained (Hayner, 2011: pp.223-224).

Yet, as confirmed by the recent analysis by Lydia Bosire and Gabrielle Lynch, the reality is ‘mixed evidence’ in Kenya (2014), and further hinted by the national’s TJRC final report in May 2013 that the commission frustration with the level of commitment provided by the CSO only exacerbated the existing bad perceptions of the TJRC among the Kenyan public, foreign donors and legal commentators in regards to the CSOs’ attempts to “rescue” transitional justice agenda from the ruling class brinkmanship games in Kenya (T.J.R.C., 2013: Vol. 1, p.154).

Writing within the context of the 2003 TJRC Task Force headed by Makau Mutua and the more recent of the post-2008 TJRC works, Lynch and Bosire highlighted makes a contribution to the literature by providing an early case study of the Kenyan TJRC and the role of civil society (p.258). It also reveals the relative power wielded by a small number of vocal organisations, which can speak directly to the international community through their networks and contacts as well as to the Kenyan public through their civic education programmes, press statements and regular contributions to opinion editorials in leading national newspapers (p.258).

As vividly illustrated in the previous section on pioneering the transitional agenda before 2008 crisis, the 2003 task force works that came into being after the 2002 election were seen by many commentators as a key that defined the ‘unfinished business’ or eventually developing higher expectations among the public upon the directions of the 2009 TJRC operations in many ways.

While many of the human rights activists that fought against the systematic violations of human rights of President Moi regime was later elected to the parliament in aftermath of the peaceful 2002 elections, the 2003 TJRC task force and its recommendation of documenting national records of violation and injustice are itself subjected to Kenya's well accustomed of political impunity that remained pervasive after the election, witnessing various attempts to bribes the 2003 TJRC task force officers and other CSOs that supports its judicial attempts to create the first body that investigates on the past injustice since the country achieve independence (2006: p.38). In short, three main reasons inmate why the TJRC was not created in July 2004 (as recommended by the task force), and only resurfaced after the 2008 crisis:

Firstly, many politicians from the previous era of President Moi's regime shifted their political alliances to the NARC (the opposition) in the 2002 elections and perceived TJRC as a real threat to their political positions, and similar negative reactions were resurfaced as well among the politicians that were later indicted by the ICC after the 2008 crisis and perceived both ICC and TJRC as part of the international as well as national CSOs' juridical attempts to sanction against the leaders and their political malfunctions (Bosire and Lynch, 2014: p.259).

Secondly, as illustrated by Bosire and Lynch, the option of blocking the legal formation of the TJRC among the politicians 'provided relatively easy' since the proposed TJRC in 2003 was fictionally perceived by the politicians as a novel phenomenon in Kenya (p.260). Yet, the irony is that the establishment of the TJRC itself initially quite popular, and eventually anchored few supports from various CSOs

back then, including from the victims of human rights violations from the era of president Moi. However, the existing attempt of the ruling elites to sideline the important of having the TJRC was later exacerbated by the split political and legal views among the CSOs. Most interestingly is on the controversial claimed by the 2003 task force's report over the ninety percents supports of the public Kenyan upon the needs to establish the TJRC (p.260).

Yet as Bosire and Lynch noted, the actual public individual views collected by the task force are less than 1,000 peoples, and the report itself ignored the reality of the 'regional' or provinces differences in viewing the needs of transitional justice agenda through the establishment of the TJRC. Indeed there are wider divisive views whether the country needs to priorities the truth commission (as understood by the public through the idea of having the TJRC), or justice (as understood by many as prosecution through a municipal criminal proceedings) since 2003 (p.262).

Finally, in the event of the international actors remained optimistic with the newly elected president Kibaki and his NARC government plans of greater reforms and democratisation and robust economic growth, have somehow demotes the immediate needs of national TJRC and hides the peculiarity of politics of divisive views of public and splits positions of the CSOs on the transitional justice agenda (p.263). This was especially the case as the government simultaneously undertook 'radical surgery' on the judiciary, established commissions of inquiry into corruption cases, introduced free primary school education and oversaw a period of relatively impressive economic growth (Nasong'o, 2005: p.75). Many donors saw the NARC transition as a success story and were largely silent about the stalled transitional justice agenda. Only after

the 2008 crisis and how the violence is ethnically charged refocuses the international attentions on Kenya's troubled past.

As such while the post-election violence provided an instructive opportunity for the TJRC to be fully institutionalised, the commission takes bolder ambitious step by retrospectively probing on the historical injustice which is beyond immediate focus of the 2008 crisis. In, short the 2013 TJRC report and its works was build from the previous unfinished business and momentum chartered by the 2003 task force, and a centralise agenda on a truth commission, which personalised⁸⁸ by Makau Mutua and few of the related CSOs while pitched their differences from more pragmatics and majority CSOs that fought for broader justice, including reforming judiciary and the old constitution in order to harness greater justice dispensation.

This revealed the fact that there is more wider disagreement even among the CSOs at national level whether the country have affirmatively justify on the needs of institutionalising the TJRC, and to certain extend, reinforces the existing politicking attempts by the ruling elite to water down the transitional justice policy in Kenya. In the Chapter 5, I detailed the analysis that while positioning my disagreement with the TJRC official position to look at such ambitious mandates of historical injustice as transitional justice beyond the 2008 crisis since this only produced a 'paradox of success', and an unintended consequence where the overwhelming debates on which

⁸⁸ While the appointment one of the renown Kenyan legal experts based in New York to chair the 2003 task force were regarded as a welcome development for the nation's future of democratic reforms, human rights and quest for justice, majority of CSOs with more rudiment networks of grassroots that championed human rights and justice have eventually isolated themselves from Mutua's task force and he eagerness to institutionalised the country's first truth commission. In the aftermath of the 2002 elections, majority of the CSOs in Kenya seeking broader justice and not limited to the dispensation of justice through TJRC per se. While the proliferations of CSOs since the 1990s lead to the stiff competition among these non-state actors in order to capture the wider public and civic attentions, few questioned Mutua's task force's final report and its methodology in the collection of the testimony and statements.

agenda to focus among the ruling class and TJRC officers have structurally sidelining the immediate needs of serving the victims, especially the IDPs.

One of the important perils of building transitional justice agenda through TJRC is divisive political view of justice and reconciliation among the CSOs in Kenya. During the 2003 task force crusades lead by Mutua, the central focused remain on defining the legal framework at the national level through a having a mandate on truth commission that eventually leads to greater justice dispensation and constitutional reforms, especially the retributive elements of transitional justice. While his active roles in spearheading justice are solely based on the imperative agenda of the TJRC, in which later reluctantly supported by other CSOs who are more keen on broader ideas and inspections of injustice, the post-2009 agenda of TJRC was now lead not by those who previously associated with Mutua, but by the new CSOs network, the Concerned Citizen of Peace (CCP) (Bosire and Lynch, 2014: p.266.).

In contrast, for the other ‘human rights’ groups, the disputed election and postelection violence served as a critical juncture that ended their previously accommodating stance towards government elites. These groups formed a separate network, Kenyans for Peace, Truth and Justice (KPTJ), and sought to expose election rigging, question the legitimacy of election results, document human rights abuses and hold those most responsible for the postelection violence criminally accountable (p267).

The emerging of these new CSOs under the CCP provides new directions of the 2009 TJRC which politically and legally redefined the pursuits of transitional justice as a ‘soul searching’ for the country needs of national unity, forgiveness and mercy rather

than dispensing comprehensive values of justice, especially the criminal prosecution path of it that envision by KPTJ and, as understood well by the international commentators that worked on the truth commission issues; a renewed debate whether to priorities vague ideas of peace or justice resurfaced even among the CSOs and somehow mirrored the politicisation of justice among the ruling class, thereby creates a popular misperception among the public that justice and peace are two different things. As well summarised by both Bosire and Lynch,

While an in-depth discussion of ‘peace’ and ‘human rights’ groups is outside the scope of this article, it is important to note that this distinction was embraced by CSOs during and after the postelection crisis, as Kenyans interested in transitional justice clustered into two main (and sometimes overlapping) groups, each with its own aims, approach and niche in the market of social change. Both groups advocated for peace and justice, but from different angles. Roughly, the former, which seemed to coalesce around the new CCP network, focused on reconciliation and coexistence, while the latter documented violations of human rights as they were going on and emphasized the importance of tackling Kenya’s culture of impunity (p.268).

The imperative positions of the CCP and its predominant concerned of restorative justice, forgiveness and reconciliation compared to KPTJ that are more critical and nuance in their positions on securing post-conflict justice in Kenya is fairly understood through the CCP’s outstanding transnational networks with the former UN Sectary General, Kofi Annan in mediating the power sharing and transitional justice agenda; General Daniel Opande who championed the peacekeeping misisions in Sierra Leone; and Ambassador Bathuel Kiplagat who secured the credible mediation team in mediating the South Sudan crisis p.269). In return, these three diplomatic giants utilised the CCP networks to secure a mediation team for negotiating power sharing government in Kenya, including an invitation to a world distinguished scholar of truth commission, Priscilla Hayner, which allows Priscilla to significantly contribute the provisional draft of the TJRC (p.269).

As such, for the immediate success of the CCP in securing the national power sharing

agreement and its focus of transitional justice agenda were seen by other CSOs as a 'triumph of reconciliation' or peace aspects of the transitional justice agenda. While KPTJ and those who affiliated with previous Mutua's task force renewed their interests with an immediate priority of the criminal prosecutorial options, CCP's realistic path to transitional justice institutions via TJRC sit very well with the ruling class' preference on the restorative rather than retributive elements of transitional justice by the time the ICC start its probes on the 2008 crisis. This was evident when the initial draft of the TJRC bill proposed by the CCP was considered by the Ministry of Justice in drafting the legal bill of the TJRC for the first time reading or to be tabled at the parliament, and eventually captured the popular attentions of the majority of the Kenyan MPs who seek to use the national agenda of establishing the TJRC as a pretext to sideline the Waki report's calls for a domestic special tribunal. Of course, the contestation of approach and strategy to secure transitional justice options in Kenya among the CSOs have provided the political leverage for the MPs to create a fictional and polarisation ideas of justice, triggering the initial popular misperception among the public on flawed transitional justice options.

By comparing the way the ruling class responds to the CSOs contestation views and strategies during the formation stage of the 2003 Task Force and the 2009 TJRC, it can be argued here that while both are broadly defined as a restorative justice instrument (although they both recommended criminal features of justice), the former were unanimously perceived as a potential 'Trojan horse' that 'inspired' further demands of reforms and justice dispensation, and therefore rejected at all cause by the ruling class and this was considered as a major blow to those CSO's who fought for it. Meanwhile, the later commission was strategically regarded as the 'less evil options'

by the ruling class given the predominant theme of 'accountably' and transnational pressures of criminal prosecution, and therefore they have reluctantly endorsed the TJRC bill as an alternative to the ICC's options. The consequence upon the CCP's actual good intention and version of transitional justice was obvious here when they were easily being manipulated by the ruling class defiance of credible justice options in Kenya, either in the form retribution or restoration.

Nevertheless, one important lesson can be identified here. The polarisation among the CSOs' strategy toward defining transitional justice agenda in Kenya only provides further incentives for the ruling class to politicise transitional justice options. To certain extend their critical but not really constructive responds toward TJRC mirrored the CSOs operations during the bleak period of the single-party democracies in the 1980s. In regards to CSOs and democratisation struggles in Kenya, as eloquently argued by Shadrack Nasong'o, due to the official banned of the opposition party activities before 1991, many anti-establishment democratic and human right struggles take its roots through CSOs banner (2007: p.52). Ironically, in the aftermath of the return of multiparty democracy have witnessed a tremendous registration of various CSOs into active political parties that seek to challenge the incumbent President Moi of KANU regime during the 1992 elections. This not only obscured the distinction between CSOs and political party but also, contributes to problematic democratic trajectory in Kenya since civil society remained subject to political traits and manipulations (Oloo, 2007: p.95). While the post-2008 crisis CSOs' polarisation and frustration with the government have not resulting them to register as an active political party and to contest in the 2013 election, they have 'provided a space' for their just cause of justice and human rights to be subjected to the ruling class

predilections views of justice, therefore remained inefficient to sanction the state.

In addition, during the crucial period of institutionalising transitional justice options in Kenya, the CSOs demonstrated higher level of animosity by disfranchised and disengaged in more constructive manner with the TJRC formation, resulting a difficult task of justice and reconciliation, resulting their domain of civic and judicial activation spaces were malignly captured by the state.

While the CSOs' critical position are subject to wider academic debate, in the sense of the various non-state actors' roles during the continued democratic struggles in Kenya (for example, see Godsater and Sodernaum), the heavy diversion of the CSOs and its isolation from constructive engagement with the TJRC have reinforced the popular depictions of the commission's inability in pursuing its mandate, coupled with defiance of the ruling class led to its effective roles. Resulting a disconnection of the Kenyan's truth commission from the moral signaling of the healing and reconciliation tasks that commonly were being associated with other renounced TRCs, like in Argentina, South Africa and Sierra Leone.

The contesting agenda of justice among the CSOs have revealed the state-society competition between the ruling class and the CSOs in order to capture the ownership of the TJRC and shifted its human rights exercise into a site of power struggles. Thus, despite the concerted efforts of individual TJRC staff and some significant technical achievements in terms of data collected and opportunities for selected witnesses to tell 'their stories,' politically the TJRC process is widely considered to have been unsuccessful. As such, while recognise the critical roles of the CSOs, this thesis have

decided not to explore on their roles and contributions to the IDPs perspective on transitional justice throughout the author's research. Given their critical but not really constructive positions, then there is a reasonable reason to bring the conceptual framework discussed in the previous chapter 2 as the way to locate the logic of power and ideology in contextualising transitional justice processes in Kenya.

E – Conclusion: Bringing Power and Ideology in Understanding Transitional Justice in Kenya

Throughout the above analysis, I have identified two major findings that allows me utilised the conceptual framework that I developed in the previous chapter 2 on bringing power and ideology in understanding transitional justice in Kenya, with a peculiarity focused on the IDPs in the next two chapters. These two findings shall be explored in turn.

D) Transitional justice Institutions as the Site of Power Struggles and Ideological Apparatus of Post-Conflict Peacebuilding.

I have demonstrated that given the increasing interaction between multiple transitional justice mechanisms in the pasts of Latin American and various African countries, and considering the AU's commitment to striking a balance between retributive justice and restorative justice during the institutionalisation process of the ICC and TJRC in Kenya, the ICC prosecutor wished to use Kenya as an example of how to end impunity or the evasion of justice (Office of the Prosecutor (I.C.C.), 2009c). Indeed, the prosecutor suggested a 'three-pronged formula' in September 2009.

From the perspective of the ICC, the idea was to divide and expand the predominant elements of the retributive justice via the world court, so that the ICC would try the ringleaders of the post-election violence. It was also calculated that further attempts

by politicians to subvert the criminal proceedings would be avoided. In the second phase of justice, the special domestic tribunal would prosecute mid- and low-level perpetrators who could not be prosecuted under the Rome Statute's mandate. Finally, the TJRC would focus on restorative justice and on making recommendations for reforms, compensating the victims, and reconciling all Kenyans (Office of the Prosecutor (I.C.C.), 2009d).

While such a pragmatic approach to executing justice is easily understood in theory, in reality the main impediments to it are not the idiosyncrasies of the relative types of transitional justice mechanism being debated, but the limited amount of jurisdiction they receive from the state. The shifting preferences of the ruling class for either the ICC or the TJRC suggest that their primary objective is to subvert justice-seeking measures (Asaala, 2010: p.389). As Mwangi Githnji and Frank Holmquist admit, the political class became a constant hindrance to the pursuit of reforms and justice (2012: p.73). While victims were waiting for justice to be delivered, politicians could not decide which options least threatened their positions. Hence, the debate on how to build a coherent justice- and reconciliation-seeking policy is 'more about politics than justice' (Branch, 2012). 'The variety and scope of concerns to be addressed by Kenya's transitional justice process requires an inclusive approach that acknowledges not only physical but also structural violence' (Musila, 2009a: p.459).

A detailed analysis of the above discussions has revealed the heavy involvements of international and national elites, and CSOs' participation during the formation stage of the two aforementioned transitional justice instruments. For that, to contextualise the socio-legal process of institutionalising the transitional justice in local politics is to

acknowledge that the theme of justice here is embedded in the wider political contingency of the society. This is to say that any measure for dealing with post-election violence must contextualise the broader socio-political power dynamics within which justice is delivered. If transitional justice is a contested space, power relations between the major actors who are directly and indirectly involved become important factors in designing and determining the legitimacy of the justice mechanism, and in navigating law and politics during the uncertain political environment (see McEvoy and McGregor, 2008).

However, international legal scholars have often ignored the political process and the agents, ideological apparatus and power relations that shape the dynamics of transitional justice. Ruti Teitel was among the first to argue that transitional justice should be counted among the ‘uncontested realms’ and remain removed from politics. Ironically, however, Teitel (2000: p.5) also posits the idea that establishing accountability in order to end impunity is driven by the top-down approaches and exclusive political projects of the ruling class, for whom the purpose of transitional justice is not to restore justice but to secure legitimacy for the post-conflict barons (2005). The Kenyan case demonstrates that the issue of justice is inseparable from the complexity of local politics, which is a predominant theme in the works of Burgis-Kasthala on Lebanon (2013); Elander on Cambodia (2012); Hohe on Timor Leste (2003); Kelsall on Sierra Leone (2009); Thomson and Nagy on Rwanda (2011) and Quinn on Haiti (2009a).

In the aforementioned studies, transitional justice mechanisms altered the hitherto universal legal practices or the objectivity of international law during the transitional

period, as the process of integrating international jurisdiction contributed to the blind prescription of a one-size-fits-all policy. As such, transitional justice served as an instrument for securing or restoring the political elite's legitimacy rather than addressing the victims' immediate need for justice and reconciliation.

II) The Question of 'Agency and Structure': The 'Invisibility' of the IDPs

Through power and ideology, I have also displayed the active roles played by the national and international elites in mediating the transitional justice institutions in Kenya, but not on the missing of other actors or agents, namely the IDPs; the location of a critical agency or agent.

My critique will be likely argued that due to my CLS stance, I might have taken a reductionist approach in viewing transitional justice or law as subject to political instrument of those who wielded the power; a notion of sovereignty.⁸⁹ While a positive appreciation goes to those genuinely concerted their efforts in restoring justice and reconciliation in Kenya, one should be able to be fairly critical in questioning the meaning of this legal dynamics to the victims of the 2008 crisis. Indeed, this pragmatic approach would fairly be considered in Kofi Anan's thought when he urged the Kenyans not to vote for the ICC's indictees, nearly five years after he chaired the first mediation meeting that established the power sharing government (BBC News, 2012).

⁸⁹ In general, a perspective that law tends to serve as an instrument of power politics were synonym with the political realism traditions (see Morgenthau, 1948), as well as the American legal realism (see Altman, 1986) and to certain extends, have been widely used by the legal positivism to counter CLS' rejections of law as neutral from politics while both American legal realism and CLS do not necessarily shared similar views on this positions. While CLS reject the absolute distinction between law and politics, they views the nature of the relations is dialectical but not necessarily equal (Balkin, 1994: p.725.).

For that, creating a standard setting on the rules of law and human rights through transitional justice policy cannot be simply justified as a successful story of resolving the crisis, or as an absolute indicator for considering the ruling class' commitment to justice and reconciliation (Garcia-Godos and Sriram, 2013: p.38). Yet, from the perspective of those who suffered from the gross violation of human rights, we should be able to at least to reveal an indication of the conflicting parties' commitment to justice.

While a continued praised should goes to those who have made a substantive efforts in institutionalising the legal frameworks of transitional justice institutions in Kenya, a continued inquiry need to be affirmatively explained why the gap still appear between the normative framework of the rules of law that had been layout and the actual realisation of the transitional justice mandate upon the victims (for example, see Satkunanathan, 2014). Without venturing into a deeper philosophical inquiry of the different between 'law' and 'justice' like the one that precisely understood in St Augustine's maxim that 'unjust law is not a law at all' (1993: p.15), it is a common sense to anyone, including those IDPs that I have met, that while a robust legal framework of transitional justice through ICC's active engagements and TJRC parliamentary bills and its ambitious formations is a precondition to path of justice, it does not neutrally lead to the acquiesces justice either in the form of retribution or restoration.

However, I do not intend to naively view transitional justice processes in Kenya as simply suggesting that all laws are equal to politics. Rather, I argued that such

relations not binary but dialectic⁹⁰, and requiring us to recognise the position of the agency in the interplay between law and politics in analysing transitional justice institutions in Kenya, and this allows me to highlight the missing jigsaw puzzle of recognizing the imperative roles of the agents in understanding transitional justice processes in Kenya; in this case, my focus will be on the location of the IDPs as one of the victims of human rights or subaltern agent. This brings my attention to the question of agency and structure in social science.

The debate on agency and structure in recent scholarship in IR and transitional justice is well documented in Tony Lang's *Punishment, Justice and International Relations: Ethics and order after the Post-Cold War* (2008) and Phil Clark's observation of victim perspective as an agent in transitional justice processes in Rwanda (2014). Accordingly, what is broadly understood, as an actor in IR literature can be similarly termed as an agency/agent in broader debate of social sciences,

At its core, agency is the capacity to change the world. This capacity, however, is not simply a psychological characteristic; a hurricane changes the world, but we do not conventionally describe a hurricane as having agency. Rather, agency connects the psychological capacity to change with either an analytical or evaluative dimension (Lang, 2008: p.48).

The longstanding 'structure–agency' debate in the social sciences centres on the ability of individuals to determine autonomously their own actions and destinies within social, political, cultural and economic constraints (Clark, 2014: p.194).

In short, the sociological debates on agency-structure have gained prominence in IR scholarship through the publication of Kenneth Waltz's *Theory of*

⁹⁰ In this thesis, I used the word 'dialectic' as a philosophical expression on how we could reconcile two or more opposing views on the relations between law and politics. I borrowed this term from the Hegelian dialectic, in which the assumption that law remains separated from politics is the thesis, and all law equal to politics will be the antithesis. Therefore, my pragmatic views or synthesis would suggest that the relations between law and politics are dialectic or constituting each other: while law is not equal to politics, but political considerations constitute certain legal predispositions, as well as certain political values condition certain legal interpretations with or without intentions. I build this understanding based on a combination of two different CLS' traditions of Holmes's 'Path to Law' (1897) and Balkin's legal deconstructionist (1987).

International Politics (1979). Waltz argued that IR analysis is best explained at the systematic level, or 'structure' of the international system. Developing his ideas on neorealism, he further concluded that the anarchic international system produced agents (both state and non-state actors) who pursue the same goals of survival and national interest through power politics and alliance. However, the publication of Alexander Wendt's 'The Agent-Structure Problem in International Relations Theory' (1987) launched more analytical engagement with the concept of agent in IR. Inspired by Marxist Critical Theory and in response to the Waltz's reductionist stands, Wendt along with other Constructivist theorist, argues that Waltz's neorealist failed to recognise how the intentions, preference, values and ideas that agents promote result not just from their internal properties but also from the social structures within which they operate. Hence, the predominant views of Constructivist views that agent do exist independently from the structure in which they operate, but they are partly conceived by those structure. It is also important to acknowledge that the above depictions of a general debate on agency-structure in IR draws from a deeper philosophical linages of three major competing theories in social sciences as follows:

- Firstly, the structuralism perspective based on the scholarship of Emile Durkheim in highlighting the vital role of 'social facts' that structure, organise and constraint individual behavior (agent). In *Rules of the Sociological Method*, Durkheim argues that social facts are 'collective habits [that] find expression in definite forms [such as] legal rules, moral obligations, popular proverbs, social conventions, etc' which emphasise that the 'structure' of the society (1938: p.45.), rather than independent individual choice eventually determines individual agency.

- Second, the agency-centric view draws on the work of Max Weber to counter the structuralist perspective, especially its perceived neglect of individual agency. In *Economy and Society*, Weber argues that we should understand human agency as “‘action” insofar as the acting individual attaches a subjective meaning to his behaviour – be it overt or covert, omission or acquiescence’ (1978: p.4). Weber argues that individuals are not supine objects whose behaviour is determined by prevailing social and political structures but rather rational, motivated actors whose conduct should be interpreted according to the explicit or implicit meanings they ascribe to it.
- Third, various authors have attempted to bridge the divide between structuralist and agency-centric theories by emphasising a dialectical, rather than binary, relationship between structure and agency. Anthony Giddens proposes the ‘duality of structure’ in which ‘the structural properties of social systems are both medium and outcome of practices that recursively organize’ (1984: p.25). Giddens argues that individuals act within prevailing social structures, rules and conditions, while actively shaping these, such that we should view structures as ‘more “internal” than exterior to [individuals’] activities’ (p.25). However, as various critics have argued, Giddens’ theory still preferences individual agency over structural constraints, viewing the latter as fundamentally an expression of the former (for example, see Archer, 1982). In the process, Giddens appears to overstate individuals’ ability to shape the structures around them and in essence conflates structure and agency.

A second major attempt to combine structure and agency within a single theoretical framework is Pierre Bourdieu's 'theory of practice'. In Bourdieu's theory, the 'habitus' – roughly akin to agency – constitutes 'socialized subjectivity', a deep embodiment of the 'field' (or structures) within which it exists (1992: p. 126). Bourdieu's theory of the dialectical relationship between structure and agency echoes Giddens' theory but emphasises the extent to which structure is deeply embedded from the outset within the identity and behaviour of individual agency. Like Giddens, Bourdieu usefully shifts the discussion beyond the strict separation of structure and agency but, in doing so, has garnered justifiable criticism. Where Giddens' dialectical theory overstates the role and influence of agency, Bourdieu overstates the importance of structure. In arguing that the habitus is so heavily socially constituted by the field – that structure so profoundly defines agency – Bourdieu, like Giddens, is at risk of conflating the two.

In this thesis attempts to appreciate the position of the IDPs as an agent/agency, the theoretical starting-point for the analysis of the position of the IDPs in the next two chapters therefore is that we should be wary of reductionist empirical examinations of the Durkheimian or Weberian variety that explore only structure or agency, and should focus instead on their complex intersections. This dialectical approach – which echoes Clark's recent examination in Rwandan transitional justice institutions (Clark, 2014) and Newbury and Newbury's call (2000) for examinations of 'the interaction of local agency with elite policy' – is arguably central to the analysis of IDPs perspective in the next Chapters 4 and 5.

While the aimed of this thesis to highlight the ‘invisibility’ of the IDPs’ as an agency in illuminating how politically unsuccessful is the transitional justice institutions in addressing the needs of justice and reconciliation, we should considers their subaltern positions and complex intersections with the structure (the Kenyan state system, elite policy and ruling class as part of the international system). Thus, drawing from the growing body literature on transitional in Kenya (Bosire, 2009; Brown and Sriram, 2012; Igwe, 2012; Kimundi, 2011; Lynch and Zgonec-Rozej, 2013; Lynch, 2012/2013; 2010b; Musila, 2009a; Murithi and Ngari, 2011; 2010; Nmaju, 2009; Opalo, 2012; Sriram. and Brown, 2012; Waweru, 2010) and the author’s personal interactions with various actors in Kenya , the analysis (in the next Chapters 4 and 5) focuses on the behavior and responses of IDPs to the politics of justice. This may help to illuminate the relative failure or success of transitional justice mechanisms in coming to terms with its past sin of election violence, and to provide some new insights into the struggle between impunity and accountability.

Chapter 4: ‘ICC for the Big Man, But Not For Us’⁹¹: The IDPs’ Everyday Narratives of Resistance to the ICC’s Proceedings

‘The ICC need to distinguish victor’s justice from survivors’ justice. In avoiding the pitfalls of Nuremberg, in beginning to establish a credible regime of international justice, the ICC must decide whether it is truly the court of last resort, or a court that resorts to the whims of the powerful.’ (Mahmood Mamdani, Distinguished Professor of African Politics)

A – Introduction

Chapter 2 has provided an epistemological discussion of the interaction between Transitional Justice and liberal peacebuilding through power-sharing arrangements. In addition, the discussion also expands the theoretical analysis of accountability, and examines how the attempt to establish criminal accountability through transitional justice mechanisms was countered by an entrenched culture of impunity. As such, Chapter 2 suggests a conceptual framework for understanding power and ideology in relation to locate transitional justice processes and institutions in Kenya. As a consequence to the legal and political theories surveyed in that Chapter 2, the previous Chapter 3 has elucidated that such an interaction evidently occurred in Kenya’s attempts to end post-election violence with transitional justice agenda.

The discussion of this chapter is concerned with the perspectives and narratives of residents of Kenya’s Internally Displaced Persons (IDPs)’ camps, or of those who formerly lived at the camps, particularly in relation to the shortcomings of the International Criminal Court (ICC)’s intervention and its failure to advance criminal accountability. This chapter argues that, while

⁹¹ Interview with IDP no. 39, Rift Valley, March 2, 2013

the ICC's engagement in Kenya is necessary⁹² to combating impunity, the ICC's positive contributions are limited⁹³ in the sense that they do not address the victims' needs to be able to live a normal life and to be reintegrated into society. Therefore the ICC has failed to perform the basic functions for which it was created; namely, those of deterrence and retributive justice (Smidt, 2001: p.178).

The ICC's proceedings have failed to deter the suspects (see Table 4.1), and their political influence has increased the widespread sense of insecurity among IDPs. This challenges the generic assumption of the former ICC prosecutor that the court would deter any further outbreaks of political violence in Kenya (Corder, 2013). While the ICC has prevented electoral violence from being repeated during the 2013 election, it has failed to normalise the IDPs livelihood, since the ICC's proceedings have exacerbated ethnic hostilities and made more Kenyan citizens vulnerable to violence (see Carrier and Kochore, 2014; Lynch, 2013a; Ombati, 2013; Patinkin, 2013).

To avoid the threat of violence from militias connected to the ICC's suspects (see Henningsen and Jones, 2013; Kagwanja, 2009; Peters, 2011; Waki, 2009), the IDPs employed methods of 'everyday resistance'. These later developed into acts of political protest against the ICC, such as the IDPs' strategy of voting for election candidates who were 'big fish' or indictees (fieldwork note no.4, Rift Valley, April 7, 2013).

⁹² By 'necessary', it is meant that the ICC's intervention in Kenya is an indispensable requirement for instituting law and order, and cannot be replaced by the alternative local measures advocated by the Kenyan government. However, the ongoing debate on justice renders the processes of the ICC effective to a certain extent, in that the ICC concerns itself solely with members of the ruling class. As a result, the immediate needs of the victim are overlooked. See Oku, 2010

⁹³ For a useful discussion on the limitations of the ICC's operations in Africa, see Plessis, 2010a

While the ICC's crusade against impunity is a welcome development for many of those who reside in conflict zones in Africa (Waddell and Clark, 2008: p.70), there is a widening gap between the ICC's understanding of how justice should be administered and the everyday narrative of justice at the IDP camps in Kenya (Nmaju, 2009: p.91). Instead of fulfilling its primary function of 'retributive justice' (as it has been extensively defined in the Preamble of the Rome Statute) (Ghandi, 2012: p.149), the ICC has become an instrument for advancing a specific form of knowledge⁹⁴ about the politics of human rights, peace and justice, which does not address the actual needs of the victims who reside in the IDP camps. This knowledge is characterised by the mode of interaction between the ICC and the Kenyan ruling class. It is the exclusivity of such hostile interactions that removes the victims' needs from the equation.⁹⁵

If the primary focus of all the legal proceedings of the court is supposed to be with providing justice for the victims in question, surely there is an obligation for advocates of the ICC to

⁹⁴ Here, 'knowledge' refers to the political construction of knowledge produced by the ICC proceedings in relation to the Kenyan victims, rather than the technical jargon of the legal processes. The ICC represents a politics of knowledge, and the contest between the ICC and the Kenyan government concerning the narrative of justice. The ICC claims to represent the victims in its attempts to establish political accountability and to end impunity; the Kenyan government stands for defending the ICC suspects from prosecution. Yet the victims are reluctant to take sides, since what they understood as human rights, peace and justice have been marginalised and excluded by both parties. Hence, the victims' rejection of the ICC's proceedings in the 2013 elections is not a sign that they are allying themselves with the ICC suspects, but is simply demonstrative of a reluctance to adopt any critical stance. The fact that some of the ICC prosecution witnesses decided to drop their testimonies arguably supports the proposition that the ICC's form of knowledge and authority no longer represents the victims' interests. For a useful discussion on the politics of knowledge and truth in Kenya, see Cohen and Odhiambo, 1992.

⁹⁵ A few weeks before the 2013 election, some of the ICC's prosecution witnesses decided to withdraw their testimonies against Kenyatta (see Table 4.2). Both instances challenge the narrative of justice that claims that the ICC represents the IDPs, Starkey, 2013a.

steer the legal⁹⁶ discussion of the criminal proceedings towards the recognition of the concrete needs of those who suffered from the violence to be able to live a normal life. The ICC ultimately attempts to achieve this goal for the Kenyan victims through its policy of disarmament, demobilisation and reintegration (DDR). As this chapter illustrates, however, this obligation was never fulfilled. The result is that the IDPs have lost their faith in the ICC's pursuit of justice and reconciliation, while the ruling class has become increasingly detached from its commitment to delivering justice for the atrocities committed during the post-election violence.

The aim of this chapter is to identify the nature of the IDPs' understanding of justice, and to reveal the socio-political reasons that motivate them⁹⁷ in their resistance against the ICC's proceedings. This chapter draws from interviews with the IDPs, and identifies the various forms of everyday narratives and resistance among the IDPs that were later translated into the political act of voting for President Uhuru Kenyatta and Deputy President William Ruto during the 2013 election as a sign of protest against the ICC.⁹⁸ By doing so, the victims made a political decision not to take the ICC's side in its struggle against impunity; simultaneously, they also refrained from lending their support to the entrenched culture of impunity that ICC's suspects represent. The victims' decision to vote for Kenyatta and Ruto was simply one of many acts of political protest against the ICC, and its claim that it provides justice for victims.

⁹⁶ Most of the Kenyan victims have no legal knowledge of the ICC's proceedings. Their understanding is based on the politically biased reports of those living outside of the IDP camps. Interview with IDP no. 40, Rift Valley, March 2, 2013.

⁹⁷ The rationale of choosing Rift Valley is informed by the pattern of post-election violence that occurred, and on the basis of some groundbreaking studies, Anderson and Lochery, 2008.

⁹⁸ 85 of the IDPs interviewed by the author decided to vote for Kenyatta and Ruto in the 2013 election. While they are not politically very keen to support the Kenyatta-Ruto alliance, they decided to vote for the suspects as a sign of protest against the ICC's moribund form of justice. See also Hogendorn, 2013.

The first part of the discussion briefly re-visits the ICC's proceedings and its suspects in Kenya, and discussed further the uneasy relations between Kenya and the ICC, in order to highlight how the ICC's focus on individual suspects has ignored the displaced victims. Additionally, this chapter locates and examines the victims' everyday narratives of justice and resistance. This part of the analysis has been conducted on the basis of the premise that an understanding of the "social reality" of the IDPs helps us to understand their needs for justice to be delivered as a result of the interaction between government officials and ICC personnel.

As such, the IDP communities provided three main explanations for their everyday understanding of justice and resistance. Firstly, there is the claim that 'the ICC treated us like a property, but not as humans' (interview with IDP no. 41, Rift Valley, March 2, 2013). The second mode of reasoning is embodied by the question: 'why bother about the ICC when we are still living in fear?' (interview with IDP no. 42, Rift Valley, Kenya, March 2, 2013). Finally, many of the victims shared the sentiment that 'we vote for the ICC suspects to protect ourselves from those who assume that they know what's best for us' (interview with IDP no. 43, Rift Valley, March 2, 2013). Accordingly, these narratives (see the Introduction of this thesis, on the section of the methodology) highlight the central theme of the victim's perspective being neglected by existing ICC literatures on Kenya (see Branch, 2012; Brown and Sriram, 2012; Kimundi, 2011; Lynch and Zgonec-Rozej, 2013; Murithi and Ngari, 2011; Musila, 2009a; Nichols, 2013; Nmaju, 2009; Sriram. and Brown, 2012). This chapter's findings are an attempt to fill the gap by highlighting the differences between the victims' understanding of justice and that of the ICC's personnel and its suspects.

B – The ICC’s Proceedings and Its Suspects in Kenya

In the second part of Chapter 3, I explored the key events that transformed the political and legal attempts to resolve the post-election violence into a transitional justice agenda with a brief discussion of how the Waki Commission’s reports lead to the extensive politics of justice and reconciliation among the ruling class in Kenya. This form of politics was implemented by the elite in order to avoid the pursuit of effective criminal proceedings from taking place within the municipal, legal jurisdiction of Kenya, producing dire consequences for the ICC’s intervention as the only viable option for implementing the mandate of the Waki Commission in bringing the classified names of the twelve suspects⁹⁹ of the post-election violence to the attention of the Chief Prosecutor of the ICC. However, the origin of the ICC’s intervention in Kenya began slightly earlier than the release date of the Waki report and its recommendation to trust the ICC as being a final solution to crossing the threshold of international criminal jurisdiction in Kenya. The following Tables 4.1 and 4.2 summarise the criminal proceedings of the ICC and provide a summary of its cases in Kenya respectively.

Table 4.1: The Chronology of the Criminal Proceedings (until December 2014)

Dates	Key Events	Comments
February 5, 2008	The Office of the Prosecutor (OTP) of the ICC attends a media press conference, in which he states his intentions to conduct a careful and thorough investigation of the crimes committed during the period of post-election violence.	
October 15, 2008	The reports of the Waki	

⁹⁹ While speculation varies, the original twelve suspects that have been identified by the Waki Commission have never been declassified. Chief among various reasons for this, cited after the release of the report, are issues relating to national security, since the identified suspects are big names in the arena of Kenyan politics. Hypothetically, their declassification may destabilise future attempts to restore peace and national unity in Kenya, as well as potentially inhibiting future criminal investigations conducted by the ICC.

	commission are officially released to the public.	
December 6, 2008	Date of the first deadline. Just 24 hours before the deadline, both the president and the prime minister declare their commitment to following the Waki report's recommendations. This includes the establishment of the special tribunal.	
January 29, 2009	Date of the second deadline. This marks the beginning of a crucial period, during which the Kenyan parliament passes the legislation of the domestic special tribunal bill in order to provide legal jurisdiction in the creation of the special tribunal through extraordinary legal measures, rather than the ordinary criminal procedure.	<p>Unfortunately, no legislation is passed either before or after the second deadline. After the second deadline, the prime minister makes three attempts to pass legislation. Each of these attempts are made between 9 and 12 February 2009, when the majority of MPs vote against the bill on the rhetorical basis that the Kenyan juridical system is incapable of implementing such a tribunal.</p> <p>On the third attempt, the MPs reject the bill once more. This time, they chant the slogan: 'don't be vague, let's go to The Hague' [referring to the ICC].</p>
A few months after the second deadline.	At the end of February, Annan grants the third extension, but on July 16, 2009 he passes the sealed envelop to the OTP.	
July 2009	On the instructions of the Waki commission, Annan hands over the sealed envelop (in which are enclosed the classified names of the twelve suspects) to the OTP of the ICC.	Instead of calling for immediate investigations to be made, the prosecutor engages in a series of dialogues with the Kenyan government in an effort to persuade it to initiate a domestic special tribunal instead of dragging the ICC's feet over the soil of Kenya.
July 3, 2009	The OTP engages in further closed-door discussions with the representative of the Kenyan government. During these discussions, the Kenyan government signs a positive complementary contract, in which the OTP grants an extension of the existing deadline until September 30, 2009.	<p>The aim of the extension is to allow time for the gathering of sufficient evidence, so that the proceedings of the domestic tribunal can be effectively conducted.</p> <p>Failure to do this would have resulted in the automatic legal assumption that the Kenyan government wished to voluntarily surrender its jurisdiction over the investigation and prosecution of post-election</p>

		crimes to the ICC.
		Subsequent to signing the contract with the ICC, the Kenyan government makes no substantive effort to investigate the crimes and prosecute the offenders.
October 2009	The Kenyan government attempts to replace the necessary approach of retributive justice with the TJRC's approach of restorative justice. In doing so, it violates the contract that it had signed with the OTP.	
November 6, 2009	The ICC Presidency authorises the Pre-Trial Chamber II of the ICC to precede a case on Kenya.	
November 5, 2009	The OTP invokes Article 15 of the Rome Statute, which provides the prosecutor with <i>proprio motu</i> , or the authority to initiate an investigation based on the information about the crimes that he had received from Annan and the Waki Commission.	<p>Articles 12 to 15 of the Rome Statute provide a legal explanation of the ways in which the court can exercise its jurisdiction.</p> <p>The court has three main options; it can begin institute a policy of self-referral by the state party to the Rome Statute, which occurred in the case of Northern Uganda in 2003.</p> <p>Secondly, the court can opt for case referral by the UNSC, as was applied to the case of Sudanese President Bashir in the Darfur situation in 2009, and to that of Libya's late President Muammar Gadhafi and his son in 2011.</p> <p>Finally, there is the option of the case referral being made by the OTP; Kenya becomes the first case for which this option is chosen.</p>
March 31, 2010	The Pre-Trial Chamber II authorises the OTP to conduct an investigation.	The chamber's judges, Ekaterina Trendafilova, Hans-Peter Kaul and Cuno Tarfusser, deliver the written ruling that the Kenyan case can be considered as controversial, since for the first time in the history of the ICC, the prosecutor had invoked his own authority in order to initiate a case concerning crimes against

		<p>humanity.</p> <p>However, Judge Kaul voices a dissenting legal opinion, as the ruling to grant the authorisation had been passed by a 2-1 majority vote.</p>
December 5, 2010	<p>The OTP makes a public announcement of the six suspects from the twelve original names listed in the sealed envelop, who he believes to be most responsible for crimes against humanity during the period of post-election violence.</p>	<p>The first case is that of the <i>Prosecutor vs. William Ruto, Henry Kosgey and Joshua Sang</i>, who are mostly known to be allied to Prime Minister Odinga's faction of the ODM.</p> <p>The second case is the <i>Prosecutor vs. Francis Muthaura, Uhuru Kenyatta and Mohammed Ali</i>, who are mostly associated with President Kibaki's faction of the PNU and the state apparatus, which are themselves structured around the systematic element of state-sponsored violence.</p>
December 2010 and March 2011	<p>Various Kenyan MPs attempt to table a motion to vote for Kenya's withdrawal from the Rome Statute.</p> <p>The aim is to disempower the ICC and to remove Kenya from its jurisdiction.</p>	<p>Parliamentary speakers rule out the motion, as it is considered unconstitutional.</p>
January 31, 2011	<p>The Assembly of the AU endorses Kenya's motion to place the issue of deferral from the ICC's investigation in Kenya on the UNSC's agenda.</p>	
March 18, 2011	<p>The UNSC holds an open discussion and listens to the Kenyan perspective on the ICC, in which it is argued that Article 16 of the Rome Statute would allow the government to implement alternative judicial mechanisms.</p>	<p>Some of the UNSC members agree that, instead of the ICC, the domestic tribunal should handle the case. This is based on the idea that the ICC is complimentary to the state system.</p> <p>However, most UNSC members argue that the situation in Kenya does not constitute a threat to peace and security as defined by the Article 16 of the Rome Statute. Therefore, the UNSC members favor the ICC option.</p>
March 19, 2011	<p>The UNSC rejects the Kenyan request without voting on it.</p> <p>This is partly owing to the fact that some members of the</p>	<p>Justifications for rejection:</p> <ol style="list-style-type: none"> 1) The Kenyan case was neither referred to the ICC through the UNSC, nor Article 16.

	<p>power-sharing government in Kenya did not support the deferral request made to the UNSC, especially those allied to Prime Minister Odinga. He sent a letter dated the 13th March 2011, which requested that the UNSC reject the government's official request for deferral.</p>	<p>2) Referral consideration comes into effect only after a year has elapsed since the confirmation charges. The investigation had just started and the charges had not been confirmed.</p> <p>3) The attempt to reject the ICC proceedings by trying the suspects in a municipal court would have exposed them to political manipulation. There are historical precedents for this; many of the previous cases of extra-judicial killing associated with top government officials have remained unaddressed.</p>
March 31, 2011	Kenya makes an additional, direct request to the ICC to terminate its investigation in Kenya, on the basis that the OTP's investigation has a destabilising effect on the government's attempt to restore peace and security (Article 19 of the Rome Statute).	The court creates an additional appeals chamber to determine the merit of the request.
April 4, 2011	The ICC rejects Kenya's request on the basis that there is insufficient evidence to prove that the investigation conducted by the OTP affects the government's reconciliation policy under the KNDR agreement.	
April 7-8, 2011	The six suspects attend the confirmation hearing of the charges.	During the hearing, one of the chamber's judges – Judge Trendafilova – raises her concerns about the 'inflammatory speeches' made by some of the suspects, suggesting that they had been trying to incite violence in Kenya since the announcement of their names as suspects in December 2010.
August 30, 2011	The Kenyan government files another motion to challenge the admissibility of the Kenyan case. However, the ICC's appeals chamber rejects it for the second time.	
January 23, 2012	The chamber's judges give a majority ruling on the confirmation of the charges against four of the six suspects.	

	The charges against the other two were dropped.	
May 24, 2012	The four ICC suspects appeal against the decision made earlier, and the judges reject it again.	
March 11, 2013	<p>The new OTP, Fatou Benouda, withdraws her cases against Francis Muthaura.</p> <p>The Judges terminate the cases against him on March 18, 2013.</p>	<p>Reasons:</p> <ol style="list-style-type: none"> 1) The potential witnesses had died. 2) Some witnesses were afraid to testify. Others admitted that they lied in their earlier testimonies. 3) There was a lack of co-operation from the Kenyan government, and a plausible case to be made that witnesses were intimidated by the government into testifying.
April 10, 2013	The original trial date for Ruto and Sang is deferred to May 28, 2013.	This decision was made at the request of the defense team in order to allow more preparation time.
April 11, 2013	The original trial date for Uhuru Kenyatta and Francis Muthaura is deferred to July 9, 2013.	The judges consider the suspect's status as the 2013 presidential candidate.
May 28, 2013	The second trial date for Ruto and Sang is deferred again to September 10, 2013.	The Judges consider the elections that took place in March 2013, and reject the request to have a trial at Nairobi or Arusha, opting instead to commence at The Hague.
July 9, 2013	The second trial date against Uhuru is deferred again to November 12, 2013.	
September 10, 2013	Trial of Ruto and Sang proceeds, and continues until January 2014.	
November 12, 2013	The second trial dates against Uhuru are deferred again to an unconfirmed date in 2014.	<p>Various commentators apply considerable political pressure in relation to:</p> <ol style="list-style-type: none"> 1) Uhuru's new position as the head of state. 2) The recent terrorist attack in Nairobi. 3) Western geostrategic interests and the increase in regional political instability in East Africa.
February 5, 2014	Lawyers representing Uhuru, the OTP and the victims meet to determine the actual date for Uhuru's trial.	None of the realistic expectations have been met. The outcome of the actual trial remains to be seen.

		<p>Uhuru's legal teams request that the OTP withdraw her case against Uhuru, due to her failure to establish a direct connection between the evidence that had been presented in previous proceedings, and the legal accusation that had already been made.</p> <p>The OTP also comes under heavy criticism from legal experts representing the victims for not revealing the actual evidence to support her claim that she does not receive a reasonable degree of co-operation from the Kenyan government during the new investigation.</p>
December 5, 2014	<p>The OTP of the ICC filed a notice to withdraw charges against President Uhuru Kenyatta. This left the current proceedings with the two existing and ongoing cases of the ICC against William Ruto and Joshua Sang.</p> <p>In addition, in relation to the ongoing claim made by the OTP of the ICC regarding the intimidation of her witnesses, an additional third case is currently pending at the Pre-Trial Chamber stage. A trial against Walter Osapiri Barasa commenced on September 1, 2013. Unlike other Kenyan suspects, the OTP of the ICC issued a warrant of arrest instead of a summons to appeal against Barasa on October 2, 2013, which required the Kenyan government to surrender him to The Hague.</p> <p>The Prosecution alleges that Walter Osapiri Barasa is criminally responsible as a direct perpetrator, under article 25(3)(a) or alternatively article 25(3)(f) of the Rome Statute for three counts of offences against the administration of justice, consisting of corruptly</p>	<p>The collapse of the case against Uhuru Kenyatta was expected by many given the extent of various political pressures.</p> <p>Consequently, this renewed the fictional sentiments among the ruling elite in Kenya and at the AU level that the jurisdiction of the ICC must be challenged in order to shield the leaders from the global call for the politics of accountability.</p>

	attempting to influence three ICC witnesses.	
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Source: The ICC Website, 'The Summary of the Situation in Kenya and Its Cases', available at: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/Pages/situation%20index.a

spx

Table 4.2: Summary of the Kenyan Suspects and the Cases Progress

The suspects	Charges	Status at the ICC
<p>William Ruto (the current Deputy President of Kenya)</p> <p>His position during the charges: the Minister for Higher Education, Science and Technology and an ODM member of the Kenyan parliament.</p>	<p>Accused as a criminally responsible and indirect co-perpetrator on the basis of article 25(3)(a) of the Rome statute for the Crimes against Humanity of:</p> <ol style="list-style-type: none"> 1. murder (article 7(1)(a)); 2. deportation or forcible transfer of population (article 7(1)(d)); and 3. persecution (article 7(1)(h)) <p>The additional initial charges:</p> <ol style="list-style-type: none"> 1. torture (article 7(1)(f). This charge was rejected by the Judges. 	<p>He was issued a summons to appear on 8th March 2011. He appeared to confirm the charges on April 7, 2011. The hearing of the confirmation of charges was scheduled for between September 1 and 8, 2011.</p> <p>The judges determined that there is a case against him on January 23, 2013; initially, they decided that the trial would begin on April 10, 2013. However, the judges allowed the defense lawyer a postponement of the trial to May 28, 2013 in order to allow the suspect more time to prepare. The trial was postponed again, and it has been confirmed that it will commence on September 10, 2013 at The Hague, and not in Kenya or Tanzania as his lawyer requested.</p>
<p>Henry Kosgey (not a member of the current parliament)</p> <p>His position during the charges: the Minister for</p>	<p>Accused as a criminally responsible and indirect co-perpetrator based on article 25(3)(a) of the Rome statute for the Crimes against Humanity of:</p> <ol style="list-style-type: none"> 1. murder (article 7(1)(a)); 2. deportation or forcible 	<p>He was issued a summons to appear on March 8, 2011. He appeared to confirm the charges on April 7, 2011. The hearing of the confirmation of charges was scheduled for between September 1 and 8, 2011.</p>

Industrialisation and an ODM member of the parliament	transfer of population (article 7(1)(d)); 3. persecution (article 7(1)(h)); and 4. torture (article 7(1)(f).	The judges ruled that there is not a case against him on January 23, 2013. The ICC dropped its suit against him.
Joshua Sang His position during the charges: the Head of Operations and radio presenter of the Kalenjin (vernacular language) radio station KASS FM	Accused as a criminally responsible and indirect co-perpetrator based on article 25(3)(a) of the Rome statute for the Crimes against Humanity of: 1. murder (article 7(1)(a)); 2. deportation or forcible transfer of population (article 7(1)(d)); and 3. persecution (article 7(1)(h)) The additional initial charges: torture (article 7(1)(f). This charge was rejected by the judges.	He was issued a summons to appear on March 8, 2011. He appeared to confirm the charges on April 7, 2011. The hearing of the confirmation of charges was scheduled for between September 1 and 8, 2011. The judges determined that there is a case against him on January 23, 2013, and initially decided that the trial should begin on April 10, 2013. However, the judges allowed the defense lawyer a postponement of the trial to May 28, 2013 in order to allow the suspect more time to prepare. The trial was postponed again, and it has been confirmed that it will commence on September 10, 2013 at The Hague, and not in Kenya or Tanzania as requested by his lawyer.
Francis Muthaura (not a member of the current parliament) His position during the charges: the Head of Public Service, Cabinet Secretary and Chairman of the	Allegedly criminally responsible as an indirect co-perpetrator based on article 25(3)(a) of the Rome statute for the Crimes against Humanity of: 1. murder (article 7(1)(a)); 2. deportation or forcible transfer of population (article 7(1)(d)); 3. rape (article 7(1)(g));	He was issued a summons to appear on March 8, 2011. He appeared to confirm the charges on April 8, 2011. The hearing of the confirmation of charges hearing was scheduled for between September 21, and October 5, 2011. The judges determined that there

National Security Advisory Committee.		<p>4. persecution (article 7(1)(h)); and</p> <p>5. other inhumane acts (article 7(1)(k))</p>	<p>is a case against him on January 23, 2012. However, the new OTP, Fatou Bensouda, filed a notice on March 11, 2013 to withdraw charges against him after the prosecutor identified a substantial number of ‘severe challenges’ during the investigation, in that:</p> <ol style="list-style-type: none"> 1. The potential witnesses had died. 2. Other witnesses were afraid to testify. The key testimony that the prosecutor relied on to build a case against him was that of the fourth witness (also known as Witness 4). During the trial to confirm the charges against Muthaura, the four witnesses claimed that they had a substantial knowledge of a ‘secret meeting’ organized by Muthaura and Kenyatta, which was held on January 3, 2008. In this meeting, the two leaders allegedly directed the Mungiki to carry out crimes. Muthaura’s lawyer challenged the credibility of Witness 4’s testimony, but the judges accepted it. However, after the confirmation of the charges in January 2012, the witness admitted in n
		<p>The additional initial charges: other forms of sexual violence (article 7(1)(g)). This charges was rejected by the judges.</p>	

		<p>interview with the OTP to lying about some earlier parts of this testimony, and to receiving payment to withdraw it. In response, the OTP decided to exclude Witness 4's testimony from the trial.</p> <p>3. A lack of cooperation from the Kenyan government, especially in providing the evidence requested, as well as access to witnesses.</p> <p>In response, the judges terminated its case against him on March 18, 2013.</p>
<p>Uhuru Kenyatta (the current President of Kenya)</p> <p>His position during the charges: the Deputy Prime Minister and Minister of Finance, Chairman of KANU and a PNU member of the Kenyan Parliament</p>	<p>Allegedly criminally responsible as an indirect co-perpetrator based on article 25(3)(a) of the Rome statute for the Crimes against Humanity of:</p> <ol style="list-style-type: none"> 1. murder (article 7(1)(a)); 2. deportation or forcible transfer of population (article 7(1)(d)); 3. rape (article 7(1)(g)); 4. persecution (article 7(1)(h)); and 5. other inhumane acts (article 7(1)(k)) <p>The additional initial charges: other forms of sexual violence (article 7(1)(g)). The judges rejected these charges.</p>	<p>A summons to appear was issued on March 8, 2011. He appeared to confirm the charges on April 8, 2011. The hearing of the confirmation of charges was scheduled for between September 21, and October 5, 2011.</p> <p>The judges determined that there is a case against him on January 23, 2013, and it was initially decided that the trial would begin on April 11, 2013. However, the judges allowed the defense lawyer a postponement of the trial to July 9, 2013 because of the 2013 presidential election in Kenya. The trial was postponed again, and it has been confirmed that it will commence on November 12, 2013</p>

New charges were later added by the OTP and accepted by the judges in March 2013, which included the extensive firing of gunshots charge that linked Kenyatta to the systematic crime (in Nivasha, Rift Valley) committed by Mungiki under his instruction.

at The Hague, and not in Kenya or Tanzania as requested by his lawyer.

As a result of the withdrawal of the testimony of ‘Witness 4’, which lead to the termination of Muthaura’s cases, Kenyatta’s lawyer requested that his case should be dropped, since the charges against him relied on the same witnesses. In addition, his lawyer requested the court to refer his case back to the Pre-Trial Chamber, so that the admissibility of his case could be re-considered in light of the technicality errors made by the OTP.

However, the OTP rebutted the argument that the withdrawal of the charges against Muthaura has no factual (de facto) or legal (de jure) implications for the case against Kenyatta. In response, the judges decided that the OTP should amend her charges against Kenyatta. By doing so, the OTP added the new charge of the firing of extensive gunshots in order to establish that the systematic crimes of Mungiki are believed to have been instructed by Kenyatta. From an evidential perspective, the amendment signified the OTP’s legal burden to fulfil her duty in presenting evidence to support the allegation. As a result,

		<p>Kenyatta was accused as an individual instead of a co-perpetrator in all the charges made against him.</p> <p>The OTP decided to terminate her prosecutions against Kenyatta by December 2014, which was a major blow to the ICC's crusade against impunity in Kenya. Furthermore, following the ICC's trial, the judges insisted that the OTP decide if she wanted to proceed with her cases against Kenyatta given the substantial damage incurred by poor witness records.</p>
<p>General</p> <p>Mohammed Ali (not a member of the current parliament)</p> <p>His position during the charges: the Chief Executive of the Postal Corporation of Kenya and Commissioner of the Kenyan Police</p>	<p>Allegedly criminally responsible as an indirect co-perpetrator based on article 25(3)(a) of the Rome statute for the Crimes against Humanity of:</p> <ol style="list-style-type: none"> 1. murder (article 7(1)(a)); 2. deportation or forcible transfer of population (article 7(1)(d)); 3. rape (article 7(1)(g)); 4. persecution (article 7(1)(h)); and 5. other inhumane acts (article 7(1)(k)) 	<p>He was issued a summons to appear on March 8, 2011. He appeared to confirm the charges on April 8, 2011. The hearing for the confirmation of the charges was scheduled for between 21 September 21, and October 5, 2011.</p> <p>The judges declined to confirm that there is a case against him on January 23, 2013. The ICC dropped its suit against him.</p>

Source: The ICC Website, 'The Summary of the Situation in Kenya and Its Cases', available at: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/Pages/situation%20index.a

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C - When the ICC Met Kenya: A Battle between Law and Politics?

Given the complexity of the ICC's pursuit of justice in Kenya, there are growing concerns regarding the bleak future of the ICC's direction in Africa, as well as the fact that the ICC's pursuit of its legal operations seem to be compounded with an element of political crusade. This issue will be discussed below.

There has been an abundant amount of literature produced on the ICC since the introduction of the Rome Statute in 1999 (Bourgon, 2003; Ceretti, 2009; Francis and Francis, 2010; Linton, 2001; Mantovani, 2003; Mundis, 2003; Picciotto, 2004; Sands, 2003; Seils, 2007; Zappala, 2003), as well as on the ICC's uneasy relations with African nations, despite Africa's active involvement with the court during the first decade of its existence (Babiker, 2010; Bikundo; Clarke, 2009; Clark, 2010; Clark, 2011a; Ford, 2009; Jalloh et al., 2011; Plessis, 2010b; Tenove, 2013; Triponel and Pearson, 2010; Vinck, 2010).

While some commentators have described the birth of such a court as the victory of accountability over impunity (Moghalu, 2006: p.15; Ocampo, 2009: p.12; Sellars, 2011: p.1087), the aforementioned literatures have revealed some of the shortcomings of international criminal justice, and challenged Hannah Arendt's assertion that the discrete legal function of any international tribunal is simply to administer justice (see Arendt, 1977). In this respect, it still remains to be seen whether the Eichmann trial allowed Prime Minister Ben Gurion to accomplish his mission to solidify Israel's national identity by invoking past

calamities (p.57). Only time can measure the extent to which a war tribunal can succeed in rewriting history and politics (Schabas, 2014: p.9).

Even if one agrees with Arendt's assertion that the primary function of a court is to restore rights, it is crucial to highlight Mark Drumbl (2007: pp.3-6.) and William Schabas (2006: pp.425-6) concerns about the growing number of non-legal functions performed by the international tribunal, as well as the extent to which politics has been trespassing on the domain of law. In this respect, the following remarks from Sir Geoffrey Nice QC are relevant to our observations of the ICC in Kenya:

The doings of judges and lawyers cannot be fully trusted. This is not because they are inherently untrustworthy, but rather because citizens cannot afford to place too much of their trust in the workings of the law. The law has become something of a religion; the lawyers and judges of the international body that represents the citizen are viewed as priests and oracles, capable not only of separating judgement from argument, but of speaking the truth. Does the law merit this respect? Is it capable of executing more than its basic function, especially when dealing with large-scale civil and international conflict? (Nice, 2013)

Interestingly, Nice was also hired by the Kenyan government in its legal quest to challenge the ICC's intervention, despite the country voluntarily submitting her sovereignty to the court's arbitration (see Table 4.1). His critical reflections on the ICC are in keeping with his reputation as 'the devil associate'; his reputation precedes his legal opinion considering his defense of many of 'the Big Fish', or indictees of unspeakable crimes in the Balkans and Africa (interview with KNHRC officer no. 3, Nairobi, March 1, 2013).

Regardless of whether or not Kenya has the legal right to challenge the ICC's jurisdiction, depictions of the ICC's proceedings have been subject to various political biases, which has resulted in increasingly awkward relations between the African Union (AU) and the ICC

(Mutua, 2010: p.8). Assuming that Nice is genuinely questioning the ability of the court to ‘speak the truth’, then it is easy to perceive that law and politics cannot be separated in the language for describing the ICC’s proceedings in Africa:

Once you acknowledge that the role of the prosecutor has a strong political dimension, then you either solve it by getting a prosecutor who is recruited for political expertise and judgment, or you provide some other mechanism to provide political oversight for the prosecutor. These are my preliminary reflections (Schabas, 2009).

The ICC insists, like other judiciaries, that it is not influenced by politics, but by the law. In the Kenya cases, however, both the state and the defendants’ responses to the ICC led to politics intruding upon the law. The defendants have used strategies of delay, mobilization of regional support, and alleged intimidation by supporters successfully to win the presidential election and to postpone their trials until after they gained power (Mueller, 2014: p.14).

As it is irrelevant to what extent those who fought and protested against the ICC appear to be innocent in their statements, their perspectives provide a persuasive summary of popular political opinion (interview with smallholding farmer no. 2, Nairobi, February 25, 2012).

While some may optimistically suggest that the primary focus of the ICC’s crusade against impunity in Africa is a welcome development (Plessis, 2010b: p.46), it is disputable to what extent it has reduced the perpetration of mass violence (Nmaju, 2009: p.83), and whether it signifies that Africa plays a leading role in International Criminal Law (ICL) (Bensouda, 2012; Editor, 2012). Some commentators have raised concerns about the post-colonial sentiments shared by AU leaders, as well the future of the victims who still reside in conflict zones (Opalo, 2012). However, accusations concerning the ICC’s geographical imbalance in focus (mainly in Africa) must be assessed in relation to the admissibility of Africa’s individual cases at The Hague, rather than by adopting the naive perception that the court is reminiscent of the ‘Whiteman’s burden’ (Mamdani, 2009: p.87).

Evidence gathered to this date suggests that not all African nations question the jurisdiction of the court (for example, Botswana). Some, like Uganda, have only recently questioned the authority of the ICC, after realising that being a head of state and having strong economic ties with western governments does not guarantee political assurance that the ICC's ongoing investigations in their country will not consider crimes committed by the state (Starkey, 2013b). The recent situations in the Ivory Coast and Libya have further confirmed that the leaders' involvement in unspeakable crimes indicates that the ICC may seem a viable solution to the moribund state of justice in many African nations (interview with the Canadian High Commission officer, Nairobi, March 6, 2012).

Ironically, the ICC's recent proceedings in the aftermath of the 2013 elections in Kenya have shown that even the legal task of fighting impunity is too difficult for it to accomplish (see also Brown and Raddatz, 2014; Dowden, 2013; Mueller, 2014). Structured by western geostrategic interests in East Africa, some major partners (especially France, Germany, Denmark, Japan, Australia, the US and the UK) have softened their tone in relation to the ICC, particularly when confronted with an increasing pressure to secure an "unholy alliance" with Kenya in order to safeguard their economic and security-based interests in regional trade, rebuilding Somalia and countering Al-Shabaab's recent terrorism in Nairobi (Brown and Raddatz, 2014: p.12).

While most of the western donors (except the US) are members of the Rome Statute, which theoretically compels them to establish a 'minimal contact' with both Kenyatta and Ruto, they

have adopted a diplomatic strategy in Kenya that is markedly different from that which they apply to Sudan (p.13). While both countries remain under the surveillance of the ICC, Kenya has been granted political exceptionality as a result of its continued “commitment” to the ICC’s proceedings (p.13). Indeed, recent works by Stephen Brown and Rosalind Raddatz (2014) have revealed the iterative cacophony of western donors’ responses to pressures for democracy, justice and peace in Kenya from the 1990s until the 2013 election.

While various Western donors seem to be vastly influential in introducing a greater amount of political liberalisation through aid sanctions, they have proven themselves to be reluctant in this pursuit. Additionally, they have sometimes underestimated the ruling class’ strategic options in defying the ICC (p.1). Foreign donors tend to defend their economic interests by opting for peace and stability, rather than by echoing the liberal cosmopolitan language of criminal accountability that sacrifices long-term objectives for democracy and human rights (see also Whitaker, 2010). This has resulted in repeated inconsistencies in their exertion of political pressure in their attempts to produce more desirable democratic outcomes.

In this respect, the works of Brown and Raddatz can be connected to the edited works of William Brown and Harman Sophie (2013), which challenge the traditional, analytical assumption of IR that the passive condition of African leaders wield little agency in defying international sanctions and pressures. In confronting international pressure for Kenya to comply with the ICC, the ruling class has come to depend on donor funding or external patronage from other sources, including China and India (Brown and Raddatz, 2014: p.5). In such instances, the Kenyan government has proven to be very adaptive in countering western

diplomats' calls for justice and accountability. The growing support of China for the Kenyan government has also caused western nations to reverse their official positions in an attempt to safeguard their primary economic interests (p.6). As such, the ruling class has been able to ensure that it receives a continual supply of foreign aid while it continues to impede the process of dispensing justice to the victims.

Indeed, as has already been discussed in Chapters 2 and 3, there is ample evidence to suggest that the Kenyan ruling class (including the ICC's suspects) has dragged the court more in its own politically zealous direction, rather than co-operating with it in its performance of legal tasks. For instance, the government had many opportunities to implement the domestic tribunal, as was suggested by the Waki Report and advised by the ICC. However, the MPs (including the ICC's suspects) chanted the slogan, 'don't be vague, let's go to The Hague' (African Confidential., 2010). Furthermore, after the confirmation of the court's jurisdiction over Kenya's post-election violence in January 2012, the government spent most of its time and the taxpayer's money in implementing its policy of "shuttle diplomacy", abusing the court proceedings, hiring the best legal counsels to defend the suspects, challenging the court's jurisdiction and declaring its intention to remove the Rome Statute from the 2010 constitution (Chapter 3).

In fact, the most awkward and pessimistic pre-election predictions for the country's future international relations with its western partners have not stopped the majority of voters from voting for both Kenyatta and Ruto (Fortin, 2013). Some have simply suggested that negative ethnicity has played a persistent role as a factor that allowed both of these suspects to unite

their ethnic powerhouses of support from both Kikuyu and Kalenjin communities (from which Kenyatta and Ruto originate respectively), as well as other communities that were profoundly affected by post-election violence. Consequently, this gained Kenyatta and Ruto the votes that allowed them to win (Lynch, 2014b: p.8).

Others have suggested that it was the ICC's indictments of both suspects that altered the unpopular status that they had held during the period of the 2008 crisis, transforming them into political stars. It was this sudden popularity that allowed them to garner votes, and to make the bold claim that voting for them would allow the public to voice its opposition to the ICC (Cheeseman et al., 2014: p.6).

By romanticising the ICC's neocolonialism, by criticising the UK's initial refusal in 2009 to help address the long-term problems caused by the colonial atrocities committed during the *Mau Mau* uprising and by underscoring the UK's rejection (as one of the UNSC's permanent members) of Kenya's deferral request, both Kenyatta and Ruto succeeded in obtaining a majority of votes (50% + 1) (BBC News, 2013). Inspired by the US's tentative response to the Rome Statute, both suspects ignored the call of the Obama administration for Kenya to observe its legal commitment to the ICC (Ongiri, 2013).

Yet to suggest that voters are illiterate and motivated by negative ethnicity alone is to deny the complexity of Kenyan social relations and identities (Shah, 2013a: p.9). 'No single ethnic group comprises even a quarter of the country's population' (Ferree et al., 2014: p.3). Recent quantitative analysis by Karen Ferree, Clark Gibson and James Long on a sample of Kenyan

voters in the 2013 elections has shown that, while negative ethnicity remains an important factor that informs voters' preferences and candidates' strategy for gaining votes, its presence in the 2013 elections was less obvious in comparison to the four elections that have occurred since 1992 (p.7). Given the previous positions of the two leading candidates—Kenyatta and Rahila Odinga—as members of the Government of National Unity (GNU, 2008-2013), they were perceived by voters as part of 'the incumbency' (p.8). This resulted in an unlikely situation, in which the election—instead of being a contest between government and opposition—became an arena in which those who fought for justice and reform through the ICC and the new constitution (Odinga's Coalition of Democratic Reforms, CORD) were pitted against those who preached economic growth, peace, stability and employment (Kenyatta's Jubilee Alliance). This can be characterized as a battle between the 'analog clock' of older generations of politicians (Odinga) and the 'digital' age of post-independence, technocratic generations (Cheeseman et al., 2014: p.7).

Although the final results of this contest did not plunge the country into another chaotic period of violence, there is no definitive evidence to suggest that it was not informed by a flawed logic on both sides (Opalo, 2014: p.11). Voters who supported Odinga's position were clearly in favor of continuing the ICC's proceedings, but the majority of younger generations were persuaded by Kenya's vision of economic growth and his aim of increasing employment enlargement (Ferree et al., 2014: p.5). Indeed, even among the few middle class Kenyans who interacted with the author, many of these later confirmed that they voted for the suspects as a symbol of protest against the earlier appearance of Obama, Hillary Clinton and other 'western hypocrites' in the country, which created a predicament in which it was likely that the old

rhetoric of neo-colonialism would be ‘renewed’ (fieldwork note no. 4; Rift Valley, April 7, 2013).

To these individuals, Obama appeared to be a product of the American political system, as well as an embodiment of the ‘myth of the American Dream, even if he’s not white’ (Interview with a local businessman, Mombasa, February 20, 2012). Even after Obama’s origins were demystified after the 2008 presidential elections in US, some perceived him as a ‘fallen angel’ who failed to realise his manifesto. By failing to close Guantanamo Bay, and to reverse the US’ position in the Rome Statute conference, Obama provided:

a good example of how bad American policy can be, but it is worse when someone who was viewed by many (especially Kenyans) as a new hope only succeeds in reinforcing the stereotypes created by the global media: that those who are perceived as good Samaritans from Africa are only good at doing a bad job outside Africa. This reminds the rest of the world that there are few good people in it, and that there are more bad leaders in Africa, which keeps people constantly hopeless! (interview with IDP no. 44, Nairobi, March 6, 2013).

In short, western geostrategic interests and the ability of the ICC suspects to secure the 2013 presidential trophy have limited the ICC’s function of deterring the suspects from engaging in further political activity that could counter its proceedings (Brown and Raddatz, 2014: p.8; Lynch, 2013b: p.5; Mueller, 2014: p.7). The next section will show how, within such a complex voting pattern, those IDPs who cast their votes in the March 2013 election began with everyday narratives and acts of protest, and later translated their everyday acts of resistance against the ICC’s dominant narrative of justice into the act of voting. While recent special issues of the *Journal of Eastern African Studies* (2014) dedicated to the 2013 election have extensively covered the Kenyan elections—with their focus on the “big man” and how the ICC’s pending cases enriched the existing discussion on the bleak state of democracy and

justice in Kenya—few critical works have articulated the perspectives of ordinary people, especially the IDPs, and their reasons for voting for the suspects.

The analysis conducted in this chapter reveals the bottom-up perspectives of those IDPs with whom the author interacted over a number of years, and who cast their votes in the 2013 elections. While political modes of analysis have a tendency to emphasise the spectacular dimensions of major events within a particular historical contingency, the IDPs' everyday narratives, social history and acts of pacifist resistance to violence have proven to be more subtle and sustainable in confronting power relations (Ackerman and Duvall, 2000: p.9).

Due to the complexity of the IDPs' identities and political motives, the next section of analysis will attempt to reveal how the dominant understanding of justice among the national elite and the ICC is "oppressive" in its attempt to discipline IDPs with its relentless focus on the twin struggles of establishing accountability and combatting impunity. Even if the attempt to establish accountability were self-imposed, it does not account for the other dimension of justice: that of satisfying the victims' needs to normalise their livelihood, rather than remaining permanently trapped in a twilight zone of displacement camps and becoming stateless people (see Pillay, 2013). The enthusiasm for these twin struggles was not shared by many IDPs, as the ICC's dominant struggle against the national elite was politically structured by a top-down, imposed image of negative ethnicity and power relations. While the IDPs' social relations and modes of exchange have been structured by existing forms of patronage, their narratives of justice and peace are best confined to their socioeconomic condition as displaced populations, rather than being placed within the elite's "given image" of ethnicity:

It is very hard to foresee any possibility that our demands for justice and reparation will be met by the court. While the government's efforts to hijack the ICC are minimal, we don't see how this ICC will eventually help us (interview with IDP no. 54, Rift Valley, March 8, 2013).

The ICC's progress is a welcome [development] considering the challenges that face us in our pursuit of justice, but since the intervention of the court our life in the camp has remained the same, as we have not resettled yet. I am not asking for immediate results, as we know that the road to justice is very long because of the difficulties created by our politicians. But why can't we at least leave in peace? (interview with IDP no. 62, Rift Valley, March 10, 2013).

As the deadline for the ICC trial approaches, the more I fear for the safety of my family, as people say that those who try to co-operate with the court [as witnesses] face threats from unknown gangs that must be hired by some big men [politicians] in Nairobi (interview with IDP no. 18, Rift Valley, February 15, 2012).

Accordingly, these narratives reveal the daunting challenge of translating the ICC's proceedings into the lexis of the everyday understanding of justice shared by the affected communities, especially those who remain vulnerable at the camps.

As the government has been too "busy" with politicising the ICC's proceedings, the dissemination of knowledge about these proceedings amongst the IDPs in Kenya by the NGO and the ICC representatives is almost insignificant, except for items of information that have been cherry picked by the mainstream newspapers in Kenya (Igwe, 2012). As has been admitted by those who worked with the ICC, its inability to provide fast-track information and its limited ability to counter criticisms about its public image from academia and the media have worsened the ICC's already negative reputation in Africa (interview with the ICC officer, The Hague, February 12, 2013).

Such a politicisation of the ICC by Kenyan leaders, and the meager dissemination of knowledge about its proceedings, have raised questions as to exactly whose narrative of peace

and justice the ICC has been representing thus far. Are there alternative narratives to be related, depending on the victim? Can we locate everyday narratives of justice and resistance within the IDP camps? As will be discussed, the majority of IDPs' decision to vote for the ICC's indictees does not simply suggest that they believe Kenyatta and Ruto are innocent (as is widely claimed by both), but is rather a sign of protest (fieldwork notes no. 4, Rift Valley, April 7, 2013).

The ICC's intervention in Kenya has only reinforced the victims' perceptions that the process is highly political, and fulfills functions other than those of deterrence or retributive justice (interview with IDP no. 51, Rift Valley, March 7, 2013). 'The ICC may be viewed as a rhetorical device, expressing international condemnation of horrific events' (Francis and Francis, 2010: p.71). The remainder of the discussion of the IDPs' critical reflections below does not simply suggest that the court should not be used to mitigate the effect of the leaders' unspeakable crimes; rather, it shows how a more nuanced recognition of how the ICC was brought into play in Kenya has allowed the ruling class to shift the primary attention away from the victim, and how the ICC's vague legal rhetoric of justice is misguided. In this titanic clash between the ICC and the ruling class, the IDPs' sense of optimism about the realistic pursuit of the 'justice cascade' has degenerated into the pessimistic view of the "casket of justice", or incapable of combating the ruling class' practice of impunity.

D – The Everyday Narratives and Resistance among the IDPs

Throughout the author's period of interaction with those residing at the IDP camps, the victims cited three main reasons for their rejection of the ICC's narrative of justice, and described their resistance as being an attempt to construct their own space to which they could

escape from the politicisation of the ICC and avoid having to interact with ICC personnel. While they prefer not to be considered as victims anymore, the social stigmatisation and economic constraints heaped upon the victims prevented them from being able to consider themselves as “normal” in comparison with other Kenyans who did not suffer directly from the post-election violence, and who do not reside at the IDP camps (interview with IDP no. 45, Rift Valley, March 6, 2013).

Generally, since 2009, those who reside at the camps¹⁰⁰ have not been afraid of speaking against the Kenyan National Dialogue and Reconciliation (KNDR). Indeed, they have done so in spite of the fact that the local authorities in charge of monitoring the camps’ residents tend to threaten the residents and warn “outsiders” not to speak to them (interview with IDP no. 61, Rift Valley, March 9, 2013). The number of residents has decreased, but this does not signify that many former residents have been successfully reintegrated into society.¹⁰¹ Only a few have managed to return to the region that they originally came from before the post-election violence.

The majority of interviewees expressed their intentions to settle at the camp permanently (fieldwork note no 2, Rift Valley, March 25, 2012). However, those who leave the camps and then return after some time incur the displeasure of the *jemadari* (officer or local authority)

¹⁰⁰ The camps and the IDP camps will be used interchangeably. There is more than one camp, but throughout this chapter, the specific location of the camp being referred to shall not be identified in order to ensure the future safety of the IDPs.

¹⁰¹ To this date, there is no official or precise statistic that determines how many IDPs have been successfully resettled. The numbers released by the government are also contradictory to the reports released by the UNCHR. Elhawary, 2009; Lynch, 2009; Robinson, 2011. .

responsible for monitoring the camps' residents (interview with IDP no. 5, Rift Valley, February 21, 2009).

The local population living outside the camps considers the camps' residents to be *watu wazimu* (mad people), and advised the author to avoid them (interview with IDP no. 1, Rift Valley, February 09, 2009). Many IDPs are socially stigmatised and viewed as 'unwanted' by local Kenyans living outside the camps, who believe that the camps are full of petty criminals (interview with smallholding farmer no. 1, Rift Valley, February 24, 2012).

While some of the camps' residents are still living in fear, especially with the 2013 election date approaching, the residents who engaged with the author did not hesitate to tell their stories. Through these daily interactions, the author discovered some of the deep-rooted assumptions underlying some of the residents' decisions to avoid ICC personnel in 2009 and 2010. It transpired that some of the residents had been avoiding ICC personnel out of fear of other IDPs who expressed their support for the ICC's suspects; they also avoided ICC personnel as a sign of protest against the progress of the Kenya case at the ICC (interview with IDP no. 38, Rift Valley, April 10, 2012). The victims' interactions with ICC personnel only succeeded in making their life more unbearable. This effect will be discussed in the section below.

I) The ICC '*Treated Us Like Property, Not As Humans*'.

For the camp's residents, the ICC's initial involvement came as a welcome relief, since none of the Kenyans believed that justice could be successfully administered by the national court system (interview with IDP no. 2, Rift Valley, Kenya, February 10, 2009). However, when the ICC representative and the local NGOs began the process of recruiting witnesses for the Office of the Prosecutor (OTP)'s case against the ICC's suspects, some residents decided not to participate.

In my second period of fieldwork in 2012, some of the camp's residents revealed their doubts about the ICC's ability to provide justice, and when confronted with the question as to whether the ICC's contribution towards establishing justice and reconciliation in Kenya was a necessity, they responded negatively. Lucy, a 56-year-old ethnic Kikuyu said that, 'the ICC only came when they needed us, and then later abandoned us' (interview with IDP no. 19, Rift Valley, February 16, 2012). Others also described their feelings of being 'disturbed' by the frequent visits of local NGOs and the ICC representative (interview with IDP no. 16, Rift Valley, February 13, 2012). Jennie, a 45-year-old ethnic Kalenjin described how, at first, she had no problem with the visits, as she was so eager to tell her stories. However, some became more reticent after these visits from outsiders became more frequent (interview with IDP no. 17, Rift Valley, February 14, 2012). As Kenneth, a 35-year-old ethnic Luo affirmed:

I always viewed their visits with a sense of relief that I was safe to talk freely, but how can I share the most humiliating parts of my life - about my wife and daughters being raped in front of me by some of those connected to the local politician – when I cannot trust the ICC as my friend? (interview with IDP no. 21, Rift Valley, February 18, 2012).

When asked about whether he had lost hope that the ICC would provide justice, Kenneth (who had worked as a teacher prior to the post-election violence) did not hesitate to admit that he had.

During my third visit to the same camp in February 2013, I met with some of the previous residents whom I had previously interviewed, who admitted that they felt betrayed by the ICC, because the court had treated them like “property”. Their lives had also been made more difficult by the ICC’s indictment of their president. Patrick, a 38-year-old former tea leaf picker said that ‘the local NGOs did come to visit us, and we knew that these people had previously represented the ICC when they needed our stories, but they treated us like we were sick and needed help’ (interview with IDP no. 39, Nairobi, March 2, 2013). One of the former residents at one of the camps, a 23-year-old ethnic Kalenjin called Cindy, told me her story:

I decided to leave the camp in November 2012, although I am not sure what future there is for me and my illegitimate child, or whether people will except me or not. I know that my husband, parents, neighbors and friends will never accept me after being raped and surviving. But the feeling of staying at the camp is worse. People think that they are safe living here, but those that I thought were our saviors [the ICC personnel] were only interested in hearing our stories, and then they left us with nothing. They said we needed help, but we need more than to just tell our story. We are also human beings, and we need to move forward so that we can start a new life (interview with IDP no. 55, Rift Valley, March 8, 2013).

From these narratives, it is obvious that the residents feel that they were betrayed by the local NGOs and the politicians who campaigned¹⁰² for the ICC in its attempts to recruit witnesses.

¹⁰² It was difficult for the author to determine whether, by ‘outsiders’, the residents were referring to the ICC’s representative, the local NGOs or other international development agencies. However, some of the residents affirmed that nearly all of those visitors (including researchers like myself) asked them to complete a similar ICC questionnaire, fieldwork note no. 2, Rift Valley, March 25, 2012.

The initial optimism that justice would be dispensed after the post-election violence transformed into a feeling of being “harassed” by the ICC’s visits. While being visited by the ICC representative, the residents felt that they were being treated like property. Being treated like ‘property’ refers here to the ‘feeling of being possessed and incapable of doing something meaningful in life as a human being or an autonomous agent’ (interview with KNHRC officer no. 3, Nairobi, March 1, 2013). According to the phenomenology of victimhood, the pain and trauma sustained by victims during the violence itself is the initial phase in the individual’s journey towards realising his or her life potential (Walker, 2006: p.14).

While violence reduces the agent’s capability to pursue his or her aspirations, the ICC’s continuous visits - which focused solely on the victims’ testimonies – shattered the victims’ normative expectations that are so fundamental to their collective sense of being human (fieldwork note no. 4, Rift Valley, Kenya, April 07, 2013). The societal expectation of being able to exist as a ‘normal’ human is shattered not only when human rights are violated, but also when the post-conflict initiative romanticizes the strategy of ‘healing’ the victim’s traumatic experience (Scarry, 1988: p.35).

The feeling of insecurity that necessitates psychological healing may be crucial during the immediate aftermath of violence, but as time passes the victim’s expectations become less concerned with the direct focus on justice or trial as seen at The Hague, and more with the gradual process of societal reintegration. The IDP camps have created a “psychological boundary” between the resident victims and other Kenyans who live outside the camps; camp residents feel less human as representatives of the ICC and international development agencies

treat them like they are ‘abnormal’, or as property that needs to be appropriated (Parsitau, 2011: p.496). Consequently, their needs to be integrated back into society are ignored. ‘When we asked those outsiders [ICC representatives]: when can we live like normal people, as we are tired of this endless pursuit of justice?’ They said, ‘justice is a long process’ (interview with IDP no. 28, Nairobi, March 8, 2012).

Hence, the victims’ feelings of being treated like property transformed the IDP camps into a communal space, in which the victims could plan how to avoid the ICC by lying and pretending to co-operate with international agencies. Frank, a 34-year-old Kikuyu, summarised this strategy thus:

When the outsiders [international NGOs and ICC representatives] came to us, we had few options. We pretended that we were so busy with daily tasks even though we had no formal jobs, so they avoided us. Of course! We could not talk openly about politics or else the local authority in charge of monitoring our camp would have accused us of inciting violence. We sometimes meet people from outside the camps scribbling about what those Nairobians think about the ICC, and we tell the same stories to those outsiders so that they are satisfied, even though the stories are mostly lies (interview with IDP no. 23, Rift Valley, March 2, 2012).

Frank’s narrative reveals the everyday form of non-cooperative measures adopted by the IDPs. The strategy of telling lies, or of repeating similar stories about the ICC that they heard from Kenyans who had traveled to Nairobi, became a way of creating a dominant narrative about the ICC that did not actually represent the victims’ own stories: ‘We mostly have our own opinions about the ICC and justice, but those who came to visit us only wanted to confirm their perspectives, but were not interested in our opinions. So we tell them what they want to hear’ (interview with IDP no. 46, Rift Valley, March 6, 2013).

Though Frank's narrative does not represent that of every IDP, it does help to explain why some of the victims hired by the OTP as witnesses later dropped their testimonies (see Table 4.1). While the actual prosecution witnesses remain in inaccessible locations, some of those residing at the camps had some prior knowledge of the witnesses, particularly those who used to be connected to them.¹⁰³ Camp residents recognise that the camp itself marks a social boundary that segregates them from the rest of the outside world, but this does not mean that they share a collective view of justice as it is advocated by the ICC, especially since the ICC's proceedings place them in more vulnerable situations.

II) *'Why Bother When We Are Still Living in Fear'.*

The camp residents have also recently expressed their feelings of insecurity as the ICC's scheduled trial date approaches. 'Every time we hear in the news that the ICC is tightening its grip on Kenyatta and Ruto, we become more fearful for our lives, since not everyone supports the ICC's indictment of both suspects' (interview with IDP no. 56, Rift Valley, March 08, 2013) Indeed, those who publicly express their support for the ICC will become targets for others who support Kenyatta and Ruto:

A group of youths walked around and tried to harass anybody that was known to support the ICC. The group was not a big crowd, but the police just did not take any measures to stop them from beating a weak old man and his wife (interview with IDP no. 57; Rift Valley, March 9, 2013)

A 41-year-old former teacher from an ethnic Kalenjin community further explained that:

¹⁰³ It was impossible for the author to hear the first-hand perspective of the victims hired as witnesses by the OTP, as for security reasons they do not currently reside in Kenya. However, some of the IDPs had some prior knowledge of the pressure placed on their friends to be hired as witnesses. The decisions of many of the OTP's key witnesses to drop their testimonies in Kenyatta's case were informed by similar feelings held by the victims that the author had interviewed. Fieldwork notes no. 3, Nairobi, February 28, 2013.

The ICC is what I was expecting, but I am more worried about the safety of my family. A group of men from the camp surrounded our tent, chanting: 'Hague! Hague! Hague!'. They basically tried to tell everyone at the camp to isolate me because I was trying to co-operate with the NGOs who represent the ICC in Kenya (interview with IDP no. 58, Rift Valley, March 9, 2013).

Given the ICC's failure to maintain the security of the IDPs still residing at the camps, some of the residents adopted a political standpoint of neutrality, not taking the side of either the ICC or its suspects:

I have made up my mind not to support the ICC. We cannot accept whatever is being reported by the newspaper [the politician's criticisms of the ICC]. We simply agreed with Ruto's campaign so that we could get more money to buy food. What madness that they try create here, after all the madness that pushed us to live in this camp! The ICC is even crazier because those lawyers [referring to the OTP] can walk safely without being harassed. Unfortunately, I don't have enough money to hire a guard every time the gangs harass my family. So I decided to remain quiet unless those [international] people come with money (interview with IDP no. 59, Rift Valley, March 9, 2013).

These everyday narratives reveal deep feelings of insecurity, as the agents of the ICC's suspects were organising an election campaign at the camps. The victims remain in fear as long as these suspects can walk freely in the country.

Some of the victims cannot accept the fact that the judicial proceedings are taking longer than they expected. 'I will only see justice when they [the ICC's suspects] are put behind bars' (interview with IDP no. 56, Rift Valley, March 8, 2013). Others have less of an understanding about the proceedings: 'I don't understand what the ICC is all about, because my life is still haunted by the violence. I live in the year 2013, but it feels like living in 2007' (interview with IDP no. 65, Rift Valley, March 10, 2013). If justice must be seen to be delivered, there is obviously a huge difference between judicial processes as they are administered at The Hague, and the camp residents' immediate expectation that justice will be delivered.

Such feelings of fear among the victims challenge the legal assumption that the ICC is a transitional justice mechanism for ending impunity. The chief focus of the OTP's litigation in Kenya was on ending the cycle of impunity. Accordingly, the OTP made this statement based on the bald assumption that it would be less difficult to pursue justice in Kenya in comparison with more complex situations, such as those of Northern Uganda, Sudan, and the Central Republic of Africa (interview with the ICC officer; The Hague, February 12, 2013).

Chapter 2 also gave elaborate details of the origins of impunity in Kenyan politics, and the importance of advancing political accountability through the mechanism of transitional justice. While the origins of impunity are the concern of the investigations conducted by ICC personnel in Kenya, in terms of the local background of challenging the pursuit of justice, pinpointing the language of impunity was legally understood by the OTP as constituting one of the many objectives of justice as embedded in the Preamble of the Rome Statute, which:

....determined to put an end to impunity for the perpetrators of these crimes [crime against humanity, genocide, war crimes and aggression] and thus to contribute to prevention of such crime, ... (Ghandi, 2012: p.149)

The ICC representative also admitted that:

There is no way that the [Kenyan] suspects can make themselves immune to prosecution, as the evidence is very extensive. Yet we cannot prosecute everyone, and we can only focus on the big fish. It is the domestic prosecution that must address the lesser perpetrators (interview with the ICC officer; The Hague, February 12, 2013).

This language of impunity became the specific focus of the OTP's investigations in Kenya's post-election violence, since the relationship between the violence and the cycle of impunity has already been extensively documented (see T.J.R.C., 2013). However, such an

understanding of impunity and the advancement of accountability does not facilitate a local legal process of prosecuting lesser perpetrators, since some of those accused perpetrators remain free and maintain strong ties to the government (interview with KNHR officer no. 3, Nairobi, March 1, 2013).

This leads to an additional question: how effective is the ICC's focus on the big fish in building the momentum of domestic prosecutions against lesser perpetrators? According to the Kenyan government's unverified statistics, by August 2011 there had been 9000 criminal cases related to the post-election violence reported since March 2008 (interview with Kenyan government officer no. 2, Nairobi, March 18, 2012). However, nearly 8000 of these cases were put on hold by the attorney general and eventually dismissed by the police (Nichols, 2013). The Kenyan government simply claimed that it had no substantive evidence for all of these cases, despite the number of deaths that were reported. In addition, the government made the unfounded claim that at least 356 of the cases had been brought to local courts, despite the fact that no convictions resulting from these cases have ever been reported in the mainstream newspapers (interview with Kenyan government officer no. 2, Nairobi, March 18, 2012). In addition, the government claimed that at least 900 perpetrators of rape and sexual assault have been convicted. From the official report released after the post-election violence, the number of deaths is estimated at around 1100, and only three criminal cases related to these deaths were convicted by the local court (U.N.C.H.R., 2008a: p.16).

However, the Kenyan government made another unverified claim that 49 cases had been convicted, rather than three (interview with Kenyan government officer no. 2, Nairobi, March

18, 2012). Even after considering the small number of cases that the government claims have been concluded, the actual number of the cases concluded is less than five percent of the original report of 9000 cases. Indeed, according to the 2012 Human Rights Watch (HRW) report, out of the five percent of cases mentioned by the government, not one perpetrator has been convicted of crimes against humanity as they are defined by the 2009 International Criminal Act. Instead, they have been convicted of civil assault against neighbors, cattle looting and civil disobedience (Human Rights Watch, 2011: p.12).

In other words, no perpetrator has been convicted on the grounds of having committed crimes against humanity, despite the government's claim that they can conduct judicial process that are equal to the ICC's proceedings (p.27). Consequently, these facts send a clear message to the IDPs that the ICC's focus on the big fish does not catalyse the advancement of criminal accountability through the process of domestic prosecution handled by the government (Human Rights Watch., 2011: p.35).

Secondly, it informs the victims of the lack of integrity in the government's commitment to prosecuting the ICC's suspects through a municipal court. 'In Kenya, as elsewhere in Africa, the rule of law is still weak, politicised, and hard to enforce; individuals are often sanctioned for trying' (Mueller, 2014: p.2). Finally, IDPs are unlikely to display any inclination to help the ICC or the domestic court, seeing as they function as pretexts for the ruling class to witch-hunt their political enemies (interview with IDP no. 27, Rift Valley, March 10, 2013).

Furthermore, neither the Rome Statute nor domestic criminal laws are being implemented with the aim of securing the fundamental rights of the victims of mass atrocities to retributive justice and the deterrence of future transgressions (Mueller, 2014: p.9): ‘the ICC does not cater to my need for justice, nor does it do anything to improve the government’s opinion of it’ (interview with IDP no. 60, Rift Valley, March 9, 2013). Indeed, the success of the 2013 election that saw Kenyatta elected as president reinforced the beliefs of local human rights activists that the ICC has failed to break the cycle of impunity in Kenya (interview with KNHRC officer no. 3; Nairobi, March 1, 2013).

The above discussion reveals the extent to which the justice that has been administered at the ICC differs from the conception of justice shared as understood at the camps. The legal process of addressing the post-election violence has matured in the context of the rise of criminal tribunals and an increase in political knowledge about justice; the ICC may have shaped the March 2013 election, yet the Kenyan ICC indictees have become “immune” to the humanitarian question about what constitutes political justice for IDPs.

Ironically, while the OTP of the ICC glorifies the atrocities to which the victims have been subjected and the stateless conditions of the IDPs in her crusade against Kenyatta and Ruto, she now occupies a similar position to the indictees (see also Editor, 2012). This is because both the OTP and the indictees use victims as primary objects of knowledge in their attempts to pursue and defy accountability respectively. In this ‘clash of the titans’, the judicial and non-judicial battles between the OTP and the indictees “disciplines” the IDPs, and disconnects them from their original desire for justice and reconciliation.

What the victims initially perceived as measures for addressing humanitarian crises and administering justice for violations of human rights have “mutated” into a banal conception of justice that is disconnected from the IDPs themselves. The ICC has become an irrelevant entity that initially created a sense of closeness (in terms of time and space) between it and the IDP camps when the ruling class challenged the ICC’s jurisdiction. Eventually, however, the close proximity between The Hague and Rift Valley was widened by the high level of animosity that victims felt towards the ICC when it failed to ensure their safety every time the OTP tightened her grip on the suspects (interview with IDP no. 60, Rift Valley, March 9, 2013).

At the time of writing, the OTP has been making repeated allegations that the Kenyan government intimidated her witnesses (see Opiyo, 2014). While the veracity of such allegations remains to be seen (since the OTP has not provided specific evidence to support her claim) (Ochieng and Jennings, 2014), the IDPs who were not recruited as witnesses by the OTP have been subject to various forms of intimidation, as well as the threat and actual use of violence from various vigilante groups connected to the suspects (Kenyan Human Rights Commission, 2012: p.42). Within such a hostile environment defined by complex power structures, the IDPs have remained victims.

In this respect, despite the fact that it was initially perceived as being directly connected to the victims, the ICC has become a tool for the elite (as well as for international policymakers) to make the IDPs’ lives more unbearable. This is owing to the fact that the elite and the

international policymakers have only taken a sensational interest in their stories and narratives of displacement (fieldwork note no. 4, Rift Valley, April 7, 2013). Hence, the ICC's administration of justice is partial, and differs markedly from the IDPs' understanding of justice.

Consequently, the victims manifested their everyday resistance through non-cooperative modes of behavior, avoiding international agents who asked about them for their opinion of the ICC. They have also been forced to tell lies in order to survive, and to escape from the power structures of the international and national elite, around which the ICC trials revolve. Given the persistence of impunity, the failure of the ICC to reduce the vulnerability of those survivors who reside far from the palace of justice at The Hague has given rise to the popular understanding that the ICC's proceedings have only succeed in making the IDPs' lives more difficult.

To some, the ICC has become an 'unexpected oppressor' (interview with IDP no. 66, Rift Valley, March 10, 2013). 'We were so naive to believe they were benevolent' (interview with IDP no. 64, Rift Valley, March 10, 2013). 'The ICC is like the big man [politician], and when they behave as such, they are not for us!' (interview with IDP no. 47, Rift Valley, March 6, 2013). As a vehicle of justice, 'the ICC's proceedings in Kenya lack clarity and cooperation, and this limits the ICC's ability to end impunity' (interview with retired judge no. 2, Nairobi, March 15, 2012). Consequently, the IDP communities developed a political consciousness in translating their everyday narratives and resistance to the ICC through the ballot box.

III) *'We Vote for Kenyatta and Ruto as a Sign of Protest'.*

The actual number of IDPs who voted for Kenyatta and Ruto is difficult to determine, as the Kenyan Independent Electoral and Boundaries Commission (IEBC) refused to publicise the actual number of registered voters from the IDP camps who voted for Kenyatta and Ruto (interview with IEBC officer, Nairobi, April 15, 2013). The IEBC claimed that they withheld this information to maintain the security of the residents, which is understandable given the vulnerability of the IDPs. However, nearly 80% of the IDPs interviewed by the author publicly expressed their intention to vote for Kenyatta and Ruto (fieldwork note no. 4, Rift Valley, April 07, 2013).

Several days before and after the election on March 04, 2013, some of the IDPs decided to tell their stories in order to explain why they intended to vote for the suspects. Anna, a 27-year-old ethnic Kikuyu, shared her views:

Previously, I had always believed that the ICC was the only way for me to reconcile myself with my past. But I have decided to vote for Kenyatta and Ruto because I am tired of waiting for a dying form of justice. Why wait for The Hague? By voting for Kenyatta, I hope I can reconcile myself with my past and move forward (interview with IDP no. 42; Rift Valley, Kenya, March 02, 2013).

While Anna's generic narration differentiates between justice and peace, 37-year-old Sam gave a different narrative:

I didn't vote because of my ethnicity [as many analysts assumed] or because Kalenjin Ruto is allied with Kikuyu Kenyatta. I voted because I felt frustrated with the ICC's endless processes. I don't think that the ICC's suspects are innocent, judging by the way they have recently behaved. I am voting for Kenyatta not because he is innocent, but because we are upset with

those who worked for the ICC. I think those [referring to former Prime Minister Odinga] who tried to champion the ICC were trying to protect themselves, and used our need for justice from the ICC as a political weapon to be used against Kenyatta (interview with IDP no. 41, Rift Valley, March 2, 2013).

Sam's narrative gives a vivid illustration of the political standpoint of the IDPs who decided to vote as a sign of protest. However, Sam and his friends had taken part in a more everyday act of protest before the election day, when they organised a series of secret group discussions in the camp, going from one tent to another and trying to convince others to vote for the ICC's suspects. By doing so, they believed that they would send a clear message that the political leaders who supported the ICC were opportunistically trying to win the votes of the IDPs solely to gain political popularity, and that they would later forsake the victims. This view was shared by 29-year-old Akelo, who had registered as a voter in Odinga's constituency:

I will never vote for Odinga, although he comes from the same community as me. I think he betrayed us this time. I tried many times to bring our security issues to him when we were trying to co-operate with the ICC as potential witnesses. But his people [referring to Odinga's political aides] asked me to be quiet. When I related this to the NGOs who supported the ICC, they also asked me to remain silent. So I *decided to quietly convince other people* [emphasis added] who had previously voted for Odinga to protest by voting for his main rivals, Kenyatta and Ruto (interview with IDP no. 43, Rift Valley, Kenya, March 3, 2013).

When asked whether or not she was worried that the ICC's proceedings would be impeded if Kenyatta and Ruto won the election, Mary, a 56-year-old widow, said, 'it will be another hell [disaster] if violence erupts this time, but at least this will send a clear message to the ICC, who are still sleeping. Maybe our votes will be like the ringing of an alarm bell for them' (interview with IDP no. 39, Rift Valley, March 2, 2013).

However, there are others who decided not to vote this time. 25-year-old Maina, who had previously lived in the camp, stated that, ‘the best thing would be for me to go somewhere safer, though the police told us that it would be safer to vote. Not voting will also make me less guilty because I believe in the ICC, but I don’t think we will see justice any sooner’ (interview with IDP no. 48, Rift Valley, March 6, 2013). However, not all residents interviewed by the author shared Maina’s sentiments in one respect or another. 26-year-old Gracious described her situation:

The rest of us either traveled to a place where we could register as voters, or we voted from the camps. I don’t think that Kenyatta and Ruto are a good choice. But I am more devastated by the behavior of those working for the ICC, because the court has failed to secure our needs. To me, justice means the ability to live like a normal person, and to bring food to the table. The ICC’s indictment against Kenyatta and Ruto has failed to make the government any more committed to addressing our needs. I have more enemies in 2013 than I did in 2007 (interview with IDP no. 67, Rift Valley, March 10, 2013).

To the IDPs, ‘justice’ represents the ability to live like other normal Kenyans (interview with IDP no. 69, Rift Valley, March 11, 2013), to be ‘resettled in society’ (interview with IDP no. 70, Rift Valley, March 11, 2013), to ‘bring food to the table’ (interview with IDP no. 72, Rift Valley, March 12, 2013) and to maintain friendly relations with neighbors from different communities (interview with IDP no. 73, Rift Valley, March 12, 2013). Yet it is clearly impossible for the ICC to satisfy such broad expectations of justice within a fortnight, considering that the actual trial has not even begun.

These narratives not only inform us about the difference between the victims’ expectations of justice and justice as it is dispensed by the ICC; they also inform us about the residents’ everyday acts of resistance. These acts began with the IDPs’ daily behavior of avoiding those who represented the ICC, as well as refusing to trust the politicians who had championed it.

The IDPs who suffered directly from the violence espoused different views about justice from those of the AU leaders who criticised the ICC's neocolonialism. These narratives also show that the IDPs developed a political consciousness with which they could initially engage in a form of silent protest against the ICC, and then give their protests a "voice" at the polling station. Of course, this action was based on their assumptions that the ICC would increase its focus on its suspects, and re-evaluate its strategy in limiting their reckless behavior.

This explains why some IDPs from various communities (including those who had previously voted for Odinga) decided to vote for Kenyatta. In 2009, those residing at the IDP camps expressed their moral support for Odinga, because of his consistent stance on the ICC in Kenya. However, by February 2012, the IDPs who interacted with the author had expressed their concerns about some of the politicians' manipulative way of using the ICC as a means of securing political popularity (Odinga), and of avoiding delivering the justice that they had promised (Kenyatta). While Kenyatta and Ruto's behaviour was generally understood as an attempt to politicise the ICC in time for the 2013 election, the IDPs expressed their feelings of vulnerability towards those who had advocated the ICC in Kenya. They also argued that the ICC should not be silenced when their own interests as victims had been hijacked (interview with IDP no. 74, Rift Valley, March 12, 2013). The standpoint of these IDPs was shared by Odinga's campaign manager:

I had to accept that two years after collecting 1.4 million signatures in support of the ICC, 6.1 million Kenyans [voters] stated emphatically that they do not agree with what I assumed was the Kenyan position on the ICC (Wambugu, 2013).

The casting of votes for Kenyatta gained momentum from a series of disappointments that the IDPs met with during the ICC's lengthy judicial processes. This also spurred more IDPs to

adopt strategies of everyday protest, such as avoiding those who claimed to have their best interests at heart (interview with IDP no. 49, Rift Valley, March 7, 2013). While they initially believed that only the ICC was capable of prosecuting the suspects, they eventually lost faith in justice when the ICC officials, and the local NGOs who championed the ICC, ignored the IDPs' vulnerability. Simultaneously, however, the "alliance of the accused" (Kenyatta and Ruto) marched to this election with a belief in the need to prioritise "peace" over justice (Lynch, 2013b: p.15). This provided fuel for the public's belief in such peace narratives, although the fact that the IDPs voted for the suspects is by no means a signifier of their belief in these narratives (interview with IDP no. 50; Rift Valley, Kenya, March 07, 2013).

The alliance of the accused emphasises what has been characterised by commentators as a similar rhetoric of the 'ideology of order' during the election of 1974: the ruling class' persistent practice of impunity and resistance to accountability, camouflaged by the preaching of peace and stability (Cheeseman et al., 2014: p.10). While the post-election violence served as a reminder to members of the public to emphasise the importance of having peaceful elections in 2013, such narratives of peace (as manifested by stability, rather than the ICC's ongoing prosecution) were concealed by various leaders' vendettas.

Firstly, Kenyatta's defiance of the ICC led 'to a 'negative peace' characterized by cessation of hostilities, rather than a 'positive peace' built on trusting and harmonious inter-ethnic relations' (p.11). Secondly, Odinga used his support for the ICC as a means of punishing his political nemesis by convincing the masses that the 2013 election results were rigged, and that

electing Kenyatta would mean sacrificing justice for the tyranny of peace (p.11). Neither of these two heavyweights, of course, were genuinely concerned with the welfare of the IDPs.

The ICC has ignored the fact that their legal battle to provide justice for the Kenyan victims was structured by misguided politics; the failure of the ICC to recognise this led to the continual disappointment of the IDPs' hopes, causing them to reject the ICC by voting for its suspects. The IDPs came to perceive voting as being integral to their survival, which shows that their voting for the suspects was not motivated by the belief that Kenyatta and Ruto were innocent (interview with IDP no. 52, Rift Valley, March 7, 2013).

Similar acts of everyday resistance that became translated into the act of voting can be observed in Yash Ghai's reflection (2005) on the failure of the constitutional referendum. By analysing what began as acts of everyday resistance, he found that many ordinary Kenyans translated their acts of protest into the act of voting. When voters cast their votes, they effectively rejected the former Attorney General, Amos Wako's draft of the constitutional bill, which was altered during the Kibaki regime that existed between 2003 and 2007 (Cottrell and Ghai, 2007: p.23).

The only difference during the 2013 elections was that the IDPs' votes for Kenyatta and Ruto were motivated by the idea that 'sometimes you have to make it look worse in order to gain more attention [from the ICC]' (interview with IDP no. 68, Rift Valley, March 11, 2013). Despite those who reside at the camps being largely aware of the crimes for which Kenyatta and Ruto are accused, voting for both is understood to be the most strategic option for

“exposing” the shortcomings of the ICC, so that the court will refocus its attention on delivering justice and on compensating for the government’s neglect of the victims¹⁰⁴. Indeed, the OTP’s focus on collecting more evidence against the suspects has made those living at the camps more vulnerable to repercussions from Kenyatta and Ruto’s diehard followers (interview with KNHRC officer no. 3, Nairobi, March 1, 2013).

In theory, the victims’ participation is not essential to the ICC’s proceedings, and the court may eventually decide on a form of reparation that could appear reasonable to the victims (Boyle, 2006: p.311). In addition, an independent body related to the ICC, known as the ‘Trust Fund for Victims’, is responsible for implementing reparations that the ICC awards to the victims. These reparations include material compensation, rehabilitation and psychosocial support (see International Criminal Court., 2013). Victims can also request reparations from the trust fund independently, especially in cases where the convicted perpetrators of the crimes against humanity do not have sufficient assets to compensate for the damage he or she inflicted upon the victims.

However, the ICC is far from reaching its final verdicts concerning the Kenyan cases. Consequently, this limits the ability of the trust fund to provide the necessary reparations required by the IDPs. In municipal court practice, victims’ rights are respected through the practices of civil and common law (Garkawe, 2003: p.347). In civil law cases, the victims who

¹⁰⁴ When the IDPs are confronted with two options, they tend to vote for the ICC’s suspects instead of Odinga’s CORD. Despite Odinga’s persistent championing of the ICC, many of the IDPs believe that Odinga betrayed them when he was still prime minister. Hypothetically, the IDPs may have voted for Kenyatta and Ruto in an attempt to draw attention to Kenya’s precarious condition at the ICC. Fieldwork note no. 4, Rift Valley, April 7, 2013.

are deemed to be the most vulnerable and to have suffered the gravest abuses could present their opinions to the judges. In common law, the victim's opinion is crucial, especially in convicting criminals. However, the practice of either civil or common law is not necessarily applicable to the ICC proceedings (Stahn et al., 2006: p.225). This constrains the ability of the ICC to consider the situation from the victim's perspective.

In March 2012, the ICC delivered its first ruling in the case of Thomas Lubanga of the Democratic Republic of Congo, and convicted him guilty of conscripting children, which resulted in an important precedent of immediate reparation for the underage victims (Babovic, 2012: p.125). While the ruling recognises the central role of the victim's opinion in developing a specific mechanism for the reparation of the victims, the process of implementing the ruling through the Trust Fund is limited by the financial constraints of the body, thus rendering it incapable of meeting broader reparation demands that may arise in the future.¹⁰⁵ The sentencing of the perpetrators is only one of the many elements of satisfactory justice as it is understood by the victims (Cohen, 2002: p.15).

Furthermore, various studies concerning South Africa's Truth and Reconciliation Commission recognise that the demands of the victims are various. The guarantee that the crime will not happen again, a form of reasonable restitution that would enable them to 'return' to the lives that they had lived before the conflict took place and the necessary amount of psychological support to reintegrate them into society are all demands that the victims require the court to

¹⁰⁵ The ICC Trust Fund's finances depend upon its limited funding from state parties, private donors, organisations and individuals. This system of funding is far from adequate, considering the existing number of large-scale financial reparation demands being made by victims.

meet (Wilson, 2001: p.232). However, the ICC's Trust Fund is currently unable to facilitate the IDPs' needs, while the new government under President Kenyatta has failed to fulfill his promise in his election manifesto to re-settle the IDPs within his first 100 days of governance (Munyeki, 2013).

The Kenyan IDP narratives that have been discussed above confirm that the ICC's failure to recognise the political upheavals in Kenya has reinforced the victims' understanding that justice is primarily concerned with trial and sentencing. This confirms the disparity between the ICC's understanding of justice and justice as it is understood by the victims themselves. The Kenyan cases reveal the existence of a huge gap between the incapacity and limitations of the ICC, and that the ICC is incapable of meeting the expectations of justice held by the IDP community (Sriram. and Brown, 2012: p.243).

E – Conclusion

This chapter has attempted to illustrate several lessons that can be learned from the Kenyan cases. Firstly, given the pervasive role of impunity in election-related violence, the ICC's engagement may seem necessary to advancing accountability; however, the actual results of its intervention remain to be seen. Moving beyond a legal analysis, this chapter has identified that the problem does not consist in negotiating the rule of law (the administration of justice), but in how to cultivate a political culture that respects the law, and in determining for whose sake justice is being administered. The admissibility of the Kenyan case at the ICC has provided an instructive opportunity to engage in a 'wider debate about democratization and transitional justice' (Cheeseman et al., 2014: p.3), and to examine the ICC's placement within a constellation of power relations. It also provides an opportunity to examine its limitations in

detering future violence, in the event that such violence is renewed by the recurring cycle of impunity.

Secondly, by analysing the uneasy relations between the ICC and the Kenyan elite, the findings of this chapter support the conclusion reached by Susan Mueller in her works regarding the interplay between law and politics. A central theme in Mueller's (2014) recent works on the ICC in Kenya also features in her previous and noteworthy study of the post-election violence (2008). The theme concerns the critical obligation to examine the roles of informal norms, political behaviors, power dynamics and the ability of the agent to comply to formal laws and international norms. This approach is recommended in contrast to the focus on formal institutions, political parties and the legal ratification of the Rome Statute. In this respect, the question is not really to what extent the ratification of the Rome Statute or the creation of more international tribunals sanction the leader's crimes, but to what extent the informal norms or practice of neo-patrimonialism explains the leader's decision to comply with or to challenge the rules of law.

Before the 2008 crisis, the ICC did not pose a threat to the ruling class, and the country was keen to observe its statute. However, subsequent to the electoral crisis and the ICC's increasing focus on Africa's 'Big Men' (Bashir and Gadhafi), the court became a game changer; not only in relation to the Kenyan election, but also in relation to African regional leaders' policy of isolating themselves in order not to comply with the court (Mueller, 2014: p.14). The initial optimism that the ICC's suspects displayed in rejecting the dominant discourses of accountability (2008) degenerated into a pessimistic approach, with which the

suspects' were able to defy the court and to promote dominant discourses of impunity (2013). While Mueller's analysis has answered the question of how the ruling class successfully defied the ICC, this chapter's observations of the IDPs' everyday narratives and acts of resistance have attempted to define the power relations that informed the IDPs' rejection of the ICC.

The IDPs' acts of everyday resistance against the ICC confirms the notion that the ICC serves as an instrument for harnessing or contesting power between international society and the Kenyan ruling class, but not for providing justice to victims. Thus, as a challenge to the ICC's claim that it provides justice for victims, this chapter illustrates why the ICC is currently failing to do so from a bottom-up perspective as a result of the IDPs' decision to vote for the suspects. As has been specified, this was not because they believed that the suspects were innocent, but because the ICC had failed on two accounts. It had failed to make the IDPs less vulnerable, and failed to understand their wider expectations of justice (retributive and restorative).

As such, the IDPs' critical perspective on the ICC's moribund form of justice also confirms Peter Dixon and Chris Tenove's (2013) recent theoretical analysis of ICC as a tool of transitional justice. Dixon and Tenove suggest that, while the ICC has become a global normative authority respected by policymakers and commentators in identifying specific examples of human rights violations and mechanisms for addressing impunity and crimes against humanity, such liberal, judicial and hegemonic forms of authority 'are often unavailable to other transitional justice approaches, whose forms of authority may be well-

recognized in local context' (p.394). As a result, while the ICC allows us to visualize the "international reality" of judicial sanctions against human rights violations, its limited prosecution strategy—and the confinement of its discourse to violations alone—does not necessarily represent the interests of the victims and their wider understanding of justice. In these circumstances, the legal dialogue concerning the ICC becomes a political arena for power struggles between those suspects who remained in power and the international prosecutors who were so eager to police the state, as the ICC had failed to alleviate the unintended consequences produced by its twin struggles to establish accountability and combat impunity. A careful look at the ICC's focus on collecting evidence and prosecuting suspects reveals how the politics of human rights and justice used by the ICC and the Kenyan ruling class does not accord with the victims' fundamental, concrete understanding of justice.

Thirdly, a legal analysis alone is insufficient in conducting an examination of the local milieu and the ICC's placement within the constellation of power relations between the international and national elite, as well as the relations of these elites with the IDPs. The IDPs' vulnerability highlights the physical extent to which they have been neglected as a 'body' that is subject to the political constructions identified (in Chapter 3) as the 'embodiment of knowledge-power'.

Justice manifests itself here as the exclusive political knowledge possessed by the ICC and the ruling class, but not by the IDPs. It is the same type of knowledge that has been used here to inform us about transitional justice as a form of discursive power in relation to impunity; it is this form of power that leads to the administration of partial justice, or justice without punishment. As such, the increasing number of countries ratifying the Rome Statute through

legal analysis alone does not constitute a sufficient explanation for why some of these countries later defied the ICC. Only by tracing the trajectory of such judicial systems within the constellation of power relations and everyday narratives is it possible to explain the interplay between politics and law in transitional justice. While the ICC functioned as a means of securing legitimacy for its suspects in the 2013 election and demonstrated a rhetorical (ideological) commitment to reforms, its deficiencies also question the ICC's dominant narrative of justice (accountability), in that its goals of executing justice and pursuing accountability in order to end impunity were contested by IDPs.

Finally, the IDPs' everyday narratives and acts of resistance, their non-political acts of avoidance, non-cooperative behavior and their practice of telling lies can be characterised as the strategy of passive dissent, or the 'weapons of the weak'. These weapons serve as the expression of dissatisfaction with and rejection of the ICC's vulgar language of justice. This not only challenges the ICC's inherent assumption that it acts in the best interests of the victims, but also reveals the widening gap between the IDPs' understanding of justice and that of those in power.

What began as the passive act of avoiding the ICC's representative developed into an active rejection of the ICC when the IDPs voted for Kenyatta and Ruto. Contrary to Susan Thomson's (2013b: p.194) findings concerning the avoidance of the Gacaca court by Rwandan peasants, the Kenyan IDPs decided to give voice to their tacit avoidance of the ICC by voting

for Kenyatta and Ruto.¹⁰⁶ Drawing a conclusion similar to that reached by Thomson, however, one can assert that the Kenyan IDPs' understanding of justice and their avoidance of the ICC reveals a system of power relations, in which the IDPs' narratives represent the voice of the critical agent that has been victimised by the ruling class and ignored by the ICC proceedings. In such a context of oppressive power relations, the weak IDPs developed a political consciousness with which to reject the ICC, not in order to support the suspects but to draw international attention to their vulnerabilities: more violation equals more attention.

The consequence of the IDPs' actions was the recent occurrence of two important events in Kenya; firstly, the OTP compiled a review of the victims' testimonies in order to revise her prosecution strategy against Kenyatta and Ruto (Office of the Prosecutor (I. C. C.), 2013). Secondly, the UNCHR and the western donors decided to rechannel their contributions of foreign aid (which was intended for the resettlement of IDPs) through the NGOs, rather than directly transferring it to the government (Horn and Seelinger, 2013). However, a further analysis is required in order to illuminate how transitional justice, as a site of power struggles, was translated into the specific forms of ideological apparatus that will be discussed in the next chapter.

¹⁰⁶ Instead of not taking sides, the IDP decided to translate their everyday acts of protest into the act of voting for the suspects. In Thomson's study, the Rwandan peasants only practiced everyday acts of resistance by avoiding the Gacaca courts, see Thomson, 2013.

Chapter 5: The Truth, Justice and Reconciliation Commission (TJRC) as Ideological State Apparatus (ISA): Preaching Peace to Defy Justice

'The world is not dialectical - it is sworn to extremes, not to equilibrium, sworn to radical antagonism, not to reconciliation or synthesis. This is also the principle of evil.'
(Jean Baudrillard, French Sociologist)

A – Introduction

Chapter 4 provided an examination of the Internally Displaced Persons (IDPs)' everyday narratives and acts of resistance against the ICC in order to characterise the ICC's proceedings as a site of power struggles. To continue our observation of the ideological nature or apparatus of justice- and reconciliation-seeking policy in Kenya, this chapter turns its focus to the second transitional justice mechanism that has been applauded by the Kenyan government, namely the TJRC (see Table 5.1).

Rather than echoing the conventional assertions of existing transitional justice literature that non-legal (restorative) mechanisms like the TJRC or other Truth Commissions (TRCs) that existed in South Africa (Clark, 2012b), Sierra Leone (Shaw, 2007), Haiti (Quinn, 2009c) and Timor Leste (Drexler, 2013) compliment the retributive nature of the ICC proceedings (see Hayner, 2011), this chapter advances on the argument of Chapter 3. Chapter 3 featured the argument that transitional justice was transformed from a discursive form of power (struggles between accountability and impunity) into a concrete institution or ideological apparatus that was wielded by Kenya's ruling class in an effort to secure legitimacy without providing justice to the victims. If Chapter 4 discussed how the IDPs were excluded by the ICC, this chapter mainly focuses on the relationship between the ruling class and the victims through the lens of

the TJRC's proceedings. This chapter turns its attention to the works of the TJRC and determines the extent of its immediate relation to the IDPs on the basis of three major assumptions:

- First, given the controversy surrounding the formation of the TJRC as a political attempt to replace (but not to compliment) the primary requirement of criminal accountability in initiating justice- and reconciliation-seeking policy after the post-election violence, there is a valid justification for suggesting that the TJRC's proceedings is actually part of the ruling class' clandestine scheme to endorse impunity and to defy criminal accountability (Lynch, 2012/2013: pp.130-1).
- Secondly, given the primary aim of the TJRC or similar restorative justice mechanisms (as in South Africa's attempts to promote reparation and prioritise amnesty), it is highly probable that such a performative project will be instrumentalised by the ruling class to claim amnesty using 'acknowledged systematic impunity' rather than being used to prosecute suspects (Gona, 2010: p.245; Mamdani, 2002: p.37). As such, the TJRC was formed with the aim of 'claiming amnesty, buttressing impunity and substituting criminal justice' (interview with IDP no. 75, Rift Valley, March 13, 2013).
- Finally, what is generally understood as the moral, political and legal task of unearthing past wrongdoings through methods of inquiry and victims testimonies can be perceived as a form of 'poisonous knowledge' that intensified political tensions, prolonged negative ethnic relations, and led to a protracted period of human rights

violations and decades of economic deprivation when the final report was not followed by substantive implementation (Clark, 2013; David and Choi, 2005; Hayner, 2011; Kelsall, 2005; Verdoolaege, 2006). In this respect, non-legal mechanisms replicated rather than rectified the diabolical situations in which the victim was manipulated rather than empowered (Drexler, 2013: p.86).

This chapter's vein of analysis focuses mainly on the IDPs that followed or participated in the TJRC's hearing sessions in Rift Valley, Kenya. The author's semi-structured interviews and informal conversations with these IDPs constitute the primary body of data or material reference for the purpose of analysing their perspectives, in order to elucidate how the TJRC served as a ritual for the recognition of the ruling class' ideological commitment to partial justice and reconciliation.

In the growing integration of African nations into the international system through the liberal cosmopolitan language of transitional justice (see Nee. and Uvin, 2010), the neo-patrimonial mode of governance cannot survive unless it renews itself through the cycle of impunity in defying the transnational call for criminal accountability (T.J.R.C., 2013: Vol. IIA, pp.147-551). As such, the primary analysis should focus on exposing how the ruling class's ideological commitment to justice and reconciliation (through the TJRC) supports the cycle of impunity or the pervasion of justice.

This chapter uses Althusser's understanding of ISA to determine how the TJRC, using specific means of visualisation—by understanding their vulnerability and expressions of loss and fear—

inculcated those IDPs into believing in patronage relations and enforcing their ties to the political elite. Chapters 2 and 3 have illustrated how the ruling class' politics of control before the 2008 crisis were manifested by the *Repressive State Apparatus* (RSA).

Joseph Gitari's (2008) research on the politics of domination and repression in Kenya between 1902 and 2002 has confirmed Presidents Kenyatta and Moi's widespread deployment of violence in their efforts to retain power on the pretext of maintaining peace and order. This chapter shows how, since the 2008 crisis, the ruling class has preferred to employ ISA rather than RSA. The rise of the dominant discourses of accountability marked an increase in focus on the debate surrounding transitional justice mechanisms (Chapter 3). Rather than simply creating relational positions through power relations and the IDPs' everyday acts of resistance (Chapter 4) against the ICC's proceedings, the discourses of accountability projected by the TJRC became a ritual of recognition, through which the ruling class attempted to convince the Kenyan masses that they were committed to pursuing justice and reconciliation, as dictated by the KNDR agreement. This allowed them to utilise the TJRC operations as a means of internally inculcating the support of those who were directly affected by the post-election violence, turning the victims into subjects of political manipulation. As such, this chapter focuses on the IDPs who observed the TJRC's proceedings, and how their participation and appearance allowed them to be transformed into subjects for further political manipulation. These individuals were transformed from being victims into becoming political subjects of the ruling class' vulgar narrative of peace and reconciliation that began with the installation of the TJRC.

Three major concerns animate this chapter: First, the discussion on the popular depiction of TJRC or restorative justice in post-conflict reconstruction policy signified the ‘increased judicialisation’ or ‘centralisation’ of legal pluralism in conflict management or the pursuit of justice in an environment of ongoing conflict. However, the call for more flexible methods (such as the adoption of non-legal methods such as TRC) as proposed by legal pluralism, repeated the shortcomings of ‘formalism’ by legal positivism, and made the execution of justice in Africa reminiscent of colonialism, in the duality of administering colonial indirect rule and customary laws. Rather than complimenting the primary focus of criminal justice (via the ICC), the pluralising approach to transitional justice and the employment of bottom-up approaches to non-legal measures (via the TJRC) in transitional justice global enterprises constituted a repetition of colonial features, in that the TJRC’s proceedings were mediated by the state and the national elite, but not the victims.

Secondly, by briefly observing the promises and the pitfalls of the TJRC proceedings in Kenya, this chapter attempts to reveal that the TJRC was not installed in an effort to pursue justice and reconciliation, but to help the ruling class to retain impunity. Finally, this chapter illuminates the IDPs’ attendance at the TJRC public hearing sessions as a form of expression of vulnerable individuals; consequently, this shows how they became subjects of political manipulation when the commission’s report was not followed by substantive methods of implementation.

B – Legal Pluralism and the Legitimacy of the Non-Legal Mechanism of the TJRC

Given the limitation of criminal prosecution's effectiveness and the proliferation of TRCs in the recent development of a transitional justice industry (Chapter 1), works by Rosemary Nagy have confirmed the significance of the legal pluralist approach in order to understand the location of law in post-conflict environments (see Nagy, 2013). Indeed Ruti Teitel's adoption of a constructivist method in defining transitional justice has confirmed two important features of legal pluralism in transitional justice literature (2000).

First, the diversification and increased localisation (instead of internationalisation) of transitional justice mechanisms in their adoption by post-conflict societies; secondly, the adoption of various non-legal, indigenous and neo-traditional mechanisms alongside that of the formal legal tribunal (Nagy, 2013: p.81).

Such pluralist and comprehensive approaches to transitional justice are significant for two reasons. First, scholars and commentators recognise the limitations of legal tribunals in addressing mass atrocities, and advocate broader goals for political reconciliation in post-conflict-societies (Clarke, 2009: p.67). Secondly, these approaches suggest the wider potential of non-legal measures—such as public testimonial and investigation commissions—to address wider issues of justice and reparation (Clark, 2011b: p.15). In such instances, while the 'increased judicialisation' in addressing mass atrocities has renewed scholarly interest in examining the viability of legal pluralism in post-conflict environments, transitional justice has replicated the dual interaction between indirect colonial rule and customary law during the colonial period (see Nagy, 2008; Thomson and Nagy, 2011).

Accordingly, what is broadly understood as legal pluralism begins with the socio-anthropological examination of legal functions in a colonial administration (Griffiths, 1986: p.34). However, according to Nagy, transitional justice mechanisms represent a ‘new legal pluralism order’ in which the pursuit of various legal and non-legal mechanisms in liberal peacebuilding projects ‘take place through the interpenetration of a variety of legal and normative order across different social-legal fields at the international, transnational, state, and community levels’ (2013: p.83).

Focusing her analysis on the TRC in South Africa, the *Gacaca* Court in Rwanda and the use of *mato oput* in northern Uganda, Nagy asserts that transitional justice, as the new form of legal pluralism, has challenged the legal positivists’ understanding of law as being simply derived from the closed, top-down structure of the state system. ‘Law is not simply a set of rules, but constitutive of and constituted by social, economic and political relations’ (p.83). Yet the diversification and hybrid nature of various legal orders and approaches have become hegemonic and have adopted a reductionist stance, even in pursuing restorative justice mechanisms, such as the TRC. In this respect, Nagy cited John Griffith’s conceptualisation of legal centralism in order to explain how the reality of implementing legal plural arrangements in the transitional justice industry replicated rather than contradicted legal centralism (see Griffiths, 1986). To Griffith, legal centralism is based on the social assumption that legal order and its mechanisms derive uniformly from the state, since there is no plausibility of executing legal order without the existence of the state (p.47).

In contrast, legal pluralism does not deny the crucial element of the state to execute law, but criticises the failure of legal centralism to recognise various forces, including the roles of non-state actors and customary law (understood as non-western here) in shaping the formulation, dynamics and sources of law enforcement and authority (Tamanaha, 1993: p.194). As such, ‘law is heterogeneous and subject to “the political mobilisation of competing social forces” across an interdependent web of “semiautonomous social fields” (Nagy, 2013: p.83).

While recognising the popularity of the legal pluralist approach in examining various transitional justice mechanisms, Nagy has suggested that what is perceived as the diversity or hybridity of legal orders in post-conflict environments actually resembles legal centralism in the execution of a one-size-fits-all transitional justice policy (p.83). Nagy’s criticism prompts this thesis to suggest that there should be a greater recognition of the primary assumption of Critical Legal Studies (CLS) about the interaction between politics and law when transitional justice interacts with liberal peacebuilding practices. This has been eloquently demonstrated by Kieran McEvoy in his analysis of transitional justice in Northern Ireland.

Taking a CLS stance, he expose one of the legal positivist assumptions about ‘formalism’ in legal practice, and suggests that such features can be identified through the standardised assumptions of many international lawyers and human rights advocates working in the field of TRC, particularly the assumption that justice is a universal and uncontested system of knowledge that remains separate from political transition (McEvoy, 2008: p.19). ‘The centrality of law in “dealing with the past” is not unsurprising. Law speaks to qualities such as rationality, certainty, objectivity, universality, and uniformity that are highly prized in times of

profound social rupture’ (Nagy, 2013: p.83). Hence, what were initially perceived as hybrid or pluralising legal approaches in recognising the non-legal mechanisms of transitional justice—and the bottom-up approach to it—have eventually become hegemonic and centralised on a global scale through the adoption of a one-size-fits-all TRC or TJRC model.

This is evident in the UN *Report on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (Sriram, 2010: p.280). Additionally, commentators have advocated both legal and political objectives for liberal peacebuilding and transitional justice (Garcia-Godos and Sriram, 2013: p.7); furthermore, there has been an importation of similar TRC industries (or a “lesson learning approach”) from Argentina to South Africa, and later from South Africa to Kenya and other African countries (Lynch, 2012/2013: p.130). As a result, what were generally understood as non-legal mechanisms (such as the TJRC) in their complimenting of the primary requirement of criminal accountability have become hegemonic and ‘externalised from the lives of the ordinary people’ (Nagy, 2013: p.83).

The danger lies in the reality that what began as a non-legal mechanism from a legal pluralist standpoint has gravitated towards legal centralism and produced a hegemonic global template of restorative justice. What may seem to have been anchored in a bottom-up approach to peace or localizing transitional justice, was later initiated or taken for granted by the ruling class in its definition of a form of transition that does not meaningfully articulate the needs of the victim. ‘In Kenya, our TJRC is similar to South Africa’s TRC model, though even I sometimes found that we were not scrutinising whether the use of such mechanisms has affirmatively been justified’ (interview with TJRC officer no. 4. Nairobi, February 7, 2012).

The installation of the TJRC in Kenya was initially inspired by the “success story” of South Africa’s TRC; however, it may plausibly end in a failure to project this form of TRC, as occurred in Haiti (Quinn, 2009c) and Timor Leste (Grenfell, 2009).

C – The Chronology and Jurisdictions of the TJRC in Kenya

There has been a wealth of literature produced on the TJRC in Kenya (Kioko, 2002; Lynch, 2012/2013; Musila, 2009a; Mutua, 2004). However, there have been various attempts to help Kenya to come to terms with its troubled past through the work of truth commissions and various task forces prior to the 2008 crisis. Therefore, the following tables 5.1 and 5.2 summarise the institutionalisation of the TJRC.

Table 5.1: The Chronology of the TJRC Operations (until May 2013)

Dates	Key Events	Comments
The 2007/2008 Post-election Violence	<p>Kituo cha Katiba organized a Workshop in Nairobi on the theme ‘<i>Revisiting Transitional Justice: A Non-partisan and Non-Governmental Engagement.</i>’ The objective of the workshop is to make the issue of justice and truth as one of the major issues during the 2007 election.</p> <p>On February 28, 2008, after 41 days of intense mediation, 17 the formal negotiations were concluded with the signing of the Agreement on the Principles of Partnership of the Coalition Government (hereinafter referred to as the Coalition Agreement) between the Principals.</p>	<p>The period towards the general election was also characterised by intense violent activities by militia groups, especially the Mungiki sect and Sabaot Land Defence Force (SLDF). The government responded to the violence with great force.</p> <p>In November 2007, the KNCHR published a report on extra-judicial killings. The report concluded that the police could be complicit in the killing of an estimated 500 individuals suspected to be members of the outlawed Mungiki sect, 12 which had wreaked terror in many parts of Central Kenya and areas of urban informal settlements in the capital city Nairobi.</p> <p>Thus, the general elections of December 27, 2007 were conducted in a volatile environment in which violence had been normalised and ethnic relations had become poisoned. In effect, fertile ground had been</p>

prepared for the eruption of violence.

On March 4, 2008, the General Principles and Parameters for the Commission of Inquiry into the Post Election Violence (the Waki Commission) were signed. This Agreement, together with the Commissions of Inquiry Act, formed the basis for the appointment of a Commission of Inquiry into Post Election Violence (the Waki Commission) headed by Justice Philip Waki on May 22, 2008. The CIPEV carried out investigations and issued its report in October 2008.

The Report found that while the post-election violence was spontaneous in some areas, it was planned and financed in other places.

The Waki Commission generated a sealed list of individuals alleged to have borne the greatest responsibility for the post-election violence and recommended the formation of a special tribunal, within a specified time, for the prosecution of these individuals, failing which the list would be handed over to the Prosecutor of ICC for appropriate action (Chapter 4).

Parliament failed to establish such a tribunal within the specified time and the sealed list of names was as a result handed over to the then ICC Chief Prosecutor Luis Moreno-Ocampo. A series of events followed thereafter, leading to the indictment of six Kenyan individuals before the ICC.

The flawed options between two criminal proceeding options (Chapter 3) lead to the idea of using the TJRC as an alternative to both types of criminal prosecutorial options. However, this was rejected by the Kenyan publics.

March 4, 2008	<p>Beside the establishment of the aforementioned of the above commissions, the AU mediation team appointed Ambassador Oluyemi Adeniji, a former Minister of Foreign Affairs of Nigeria, to conclude negotiations on Agenda Item Four.</p> <p>The General Principles and Parameters for the Truth, Justice and Reconciliation Commission were signed (TJRC Agreement).</p>	<p>This Agreement formed the basis for the establishment of the TJRC. The details of the Agreement are discussed in detail in Table 5.2.</p>
May 9, 2008	<p>The legislative process officially commenced on May 9, 2008 with the publication in the <i>Kenya Gazette</i> of the Truth, Justice and Reconciliation Commission Bill by the Ministry of Justice, National Cohesion and Constitutional Affairs (Ministry of Justice). This was slightly more than one month outside the timeline given in the TJRC Agreement</p>	<p>Parties to the TJRC Agreement had anticipated that the Commission would be created within four weeks of signing the Agreement. This timeline was both ambitious and impractical for two significant reasons.</p> <p>Firstly, four weeks was too short a period for the legislative cycle to run full course, considering that the National Assembly was required to enact several other pieces of legislation emanating from the KNDR process.</p> <p>Secondly, and perhaps more importantly, four weeks was too short a period to allow for sufficient consultations with and meaningful participation of stakeholders in the legislative process.</p>
October 23, 2008	<p>After going through the full legislative cycle, the Truth, Justice and Reconciliation Act became law on October 23, 2008. The Act received Presidential Assent on November 28, 2008 and came into operation on March 17, 2009.</p>	<p>The publication of the Bill was greeted with much criticism, especially because stakeholders claimed that they had not been meaningfully engaged in its drafting. Moreover, several of its provisions on the mandate and operations of a truth commission (such as provisions on amnesty) did not reflect internationally accepted standards. This prompted civil society organisations to prepare reviews of the Bill for consideration by the Ministry of Justice and the National Assembly.</p> <p>The Multi-Sectoral Task Force on the TJRC, an umbrella body of CSOs which later evolved into</p>

the Kenya Transitional Justice Network, prepared a detailed memorandum proposing amendments to the TJRC Bill, especially in relation to its provisions on the following: objectives and functions of the Commission; economic crimes; independence of the Commission; amnesty; and implementation of the recommendations of the Commission.

Amnesty International raised similar issues and even expanded the concerns.

Some of the concerns and proposals made by the various CSOs were taken up by the Ministry of Justice and ultimately by the National Assembly. For example, the hitherto broad amnesty provisions were amended to allow for conditional amnesty for a very narrow list of crimes.

April 2009

The Selection Panel placed an advertisement in the *Kenya Gazette* and in three daily newspapers inviting applications from persons who met the qualifications set forth in the Act for nomination as commissioners.

The Act required that the Commissioners include individuals with knowledge and experience in human rights law, forensic audit, investigations, psycho-sociology, anthropology, social relations, conflict management, religion and gender issues.

The Act also included a broadly worded qualification designed to protect the process and the broad mandate of the Commission from any interference due to conflict of interest. The Act thus required that commissioners be persons who had 'not in any way been involved, implicated, linked or

The TJR Act provided for the appointment of nine Commissioners; six Kenyan citizens appointed through a national consultative process and three non-citizens selected by the African Union Panel of Eminent African Personalities.

The Act required gender equity (and geographical balance in the case of Kenyan citizens) in the selection of the Commissioners.

The selection of the Kenyan Commissioners was done through a broadly consultative process that involved civil society and Parliament. The process began with the creation of a Selection Panel composed of nine individuals nominated by various religious and professional organisations in the following proportion:

- two individuals nominated by a joint forum of religious organisations;

	<p>associated with human rights violations of any kind or in any matter which is to be investigated under this Act’.</p> <p>The Selection Panel sub-contracted a human resources firm to conduct short-listing of applicants on its behalf. The firm received a total of 254 applications. Out of these, 47 applicants were selected for interview by the Panel. After conducting interviews, 15 names were forwarded to the National Assembly for consideration. The National Assembly deliberated the suitability of the 15 individuals and narrowed the number of candidates to nine.²⁸ The Panel of Eminent African Personalities forwarded three names to the National Assembly, which in turn forwarded those names together with those of the nine Kenyans to the President.</p>	<ul style="list-style-type: none"> • one person nominated by the Law Society of Kenya (LSK); • one person nominated by the Federation of Women Lawyers (FIDA Kenya); • one person jointly nominated by the Central Organisation of Trade Unions (COTU) and the Kenya National Union of Teachers (KNUT); • one person nominated by the Association of Professional Societies of East Africa; • one person nominated by the Kenya National Commission on Human Rights (KNCHR); • one person jointly nominated by the Kenya Private Sector Alliance and the Federation of Kenya Employers (FKE); and • one person nominated by the Kenya Medical Association (KMA)
July 22, 2009	<p>By Gazette, the President appointed the following nine individuals to serve as members of the Commission:</p> <ul style="list-style-type: none"> • Bethuel Kiplagat (Kenya); • Kaari Betty Murungi (Kenya); • Tecla Namachanja Wanjala (Kenya); • Gertrude Chawatama (Zambia); • Berhanu Dinka (Ethiopia); • Ahmed Sheikh Farah (Kenya); • Tom Ojienda (Kenya); • Margaret Shava 	<p>From among the Commissioners, the President appointed Ambassador Bethuel Kiplagat as Chairperson to the Commission. The President also appointed Betty Murungi as Vice-Chairperson, though the Act made it clear that the Vice-Chairperson was to be chosen by the Commissioners themselves and not the President.</p> <p>Shortly after the members of the Commission were appointed, the Cabinet issued a statement indicating that instead of establishing a special tribunal to try those who were allegedly responsible for the 2007/2008 Post-election Violence, it would be seeking an expansion of the Commission’s to include dealing with these cases. This decision</p>

	<p>(Kenya); and</p> <ul style="list-style-type: none"> • Ronald Slye (United States). 	<p>was highly criticized by a broad sector of Kenyan society and would later have an impact on the work of the Commission although the decision never saw the light of day.</p> <p>Firstly, the decision created the impression that the government was inclined to using the Commission as a shield against those who were alleged to bear responsibility for the post-election violence.</p> <p>Secondly, a section of CSOs and donors resolved not to work with or fund the Commission until the Cabinet's decision is reversed.</p>
August 3, 2009	The Commissioners were sworn into office.	<p>During their inaugural meeting, and in accordance with Section 11(2) of the TJR Act, Commissioners elected Betty Murungi as the Vice-Chairperson.</p> <p>However, as will be discussed in detail later, Betty Murungi subsequently resigned, first as Vice-Chairperson and then as a Commissioner. While the President was required to gazette her vacancy within seven days of her resignation so that a replacement could be chosen, such notice was never published and thus no replacement was ever provided.</p> <p>From mid-April 2010 the Commission operated with only eight full-time Commissioners. When Ambassador Kiplagat stepped aside in November 2010 for sixteen months, the Commission operated with only seven full-time Commissioners.</p>
August 2010	The Commission recruited 304 statement takers and deployed them across the country to take statements from victims, their families and witnesses. Amongst those recruited were individuals who were victims of violations that fell under the Commission's mandate and scope of inquiry. Sections of	<p>The Commission did not take these concerns lightly. The decision to engage victims as staff members was based on comparative experience.</p> <p>Many truth commissions across the world have involved victims. Some of the best known truth commissions have had victims as</p>

civil society and others raised the concern that engaging victims as staff of the Commission was inappropriate.

They argued that victims would be partial by virtue of their experience and their engagement as staff of the Commission would compromise the statement taking process.

Commissioners and Chairpersons; for example, Archbishop Desmond Tutu chaired the South Africa's Truth and Reconciliation Commission. Truth commissions are designed to be victim-centred, though not victim-dominated, processes.

Engagement of victims facilitates access to victim communities, and promotes ownership and legitimacy of the process. The right to effective remedy requires that victims are involved in the processes of finding solutions to and redress for violations.

Therefore, the question before the Commission was not whether to engage victims but in what capacity and under what terms. Firstly, victims had to qualify for the position they applied for just like any other applicant and go through the interview process. Secondly, the Commission limited the recruitment of victims to statement takers and civic educators.

In the area of statement taking the Commission also adopted the policy that any individual could request a different statement taker than the one before them, thus ensuring that individuals who gave statements were provided the safest and most effective environment in which to tell their stories. Victims were not hired as investigators or as researchers, or in any positions which involved analysis of violations and identifying those responsible for such violations. In addition, the Commission took measures to ensure that cases of conflict of interest were minimised.

The engagement of victims by the Commission also had an important reparatory dimension to it. It symbolised restoration and affirmation of the dignity of victims and their right to access employment in formal

institutions.

As documented in the TJRC Report Volume Two, the majority of victims of torture and detention under President Moi's regime remained unemployed, decades later. Those who were university students at the time of their detention and torture had their education and careers abruptly and indefinitely cut short. Members of the Kenya Air Force who were suspected to have been behind or supported the 1982 attempted *coup d'etat* had their careers in the armed forces abruptly terminated and the stigma surrounding their discharge from the Force made it impossible to secure employment in any formal institution.

The small number of victims that the Commission engaged as statement takers and civic educators expressed gratitude that such an opportunity had been offered to them.

2010

In 1972 the Kenyan Parliament passed the Indemnity Act, which restricts the ability of individuals to make claims arising from acts committed by the Kenya armed forces and others acting on behalf of the government for any act they committed during the so-called Shifta War (25 December 25, 1963 – December 1, 1967).

The restriction on, among other things, any proceeding or claim to compensation is itself restricted to acts committed only in a part of Kenya: the former North Eastern Province and Lamu, Tana River, Marsabit and Isiolo districts.

The Indemnity Act thus purports to institutionalise impunity for human rights violations committed by those acting on behalf of the government during a prescribed time and in a prescribed area. In

From its inception, concerns were raised about the impact of the Indemnity Act on the Commission's work. Some were concerned that the Indemnity Act prevented the Commission from investigating, researching, discussing, or commenting on violations that occurred in the areas and during the times covered by the Act. Others argued that the Commission should devote some of its operational resources to pushing for repeal of the Indemnity Act. Still others refused to engage with the Commission unless and until the Act was repealed.

In interpreting the scope of its mandate, the Commission obviously had to address the applicability and effect of the Indemnity Act on its activities. After thoroughly considering the issue, the Commission concluded that the Indemnity Act did not apply to the work of the

other words, it attempts to create a separate legal regime with respect to accountability for the Shifta War.

To qualify for legal protection under the Indemnity Act, an individual's action must have been done in good faith and 'done or purported to be done in the execution of duty in the interests of public safety or the maintenance of public order, otherwise in the public interest'.

Since the passage of the Indemnity Act many have argued for its repeal, including and not surprisingly, residents of the affected areas. Parliament voted to repeal the Indemnity Act in 2010.

The President however refused to assent to the repeal and thus the Indemnity Act continues to be part of the laws of Kenya.

Commission and thus could not restrict in any way the work of the Commission. There are two arguments that support the Commission's conclusion.

First, the Indemnity Act makes it clear that its restrictions with respect to accountability do not apply to 'the institution or prosecution of proceedings on behalf of the government'. This section makes clear that the focus of the legislation is on restricting the right of private individuals to bring a claim for compensation or other form of accountability. The Commission is an independent government commission that was created by and works on behalf of the government. As such the Commission clearly is engaged in 'proceedings on behalf of the government' and thus its operations are excluded from the provisions of the Indemnity Act.

Second, even if one were to argue that the Indemnity Act by its terms applies to and thus restricts the powers of the Commission, the passage of the TRJ Act, which, under this argument, conflicts with the provisions of the Indemnity Act, would prevail as it was passed after the Indemnity Act. It is a fundamental principle of the rule of law that if two pieces of legislation conflict, the one passed later in time applies unless the later legislation makes clear that it is subject to the previous legislation.

In this case, Parliament passed the TJR Act in 2008 and decided not to make the Commission subject to the Indemnity Act. This argument is strengthened by the fact that Parliament did expressly indicate that the Commission is subject to other pieces of legislation that conflict with the TJR Act, such as the Protected Areas Act.

July, 2011

The Commission was accused of corruption and other financial improprieties.

Reports surfaced in the media alleging corruption within the Commission. The media reports appeared to reference internal documentation of the Commission although sourced through other organisations.

This prompted the Commission to undertake urgent internal investigations. It was found that the media reports were unfounded. The investigations were undertaken with the generous cooperation of an organisation in which the individual who released the false information worked.

The Commission was dismayed to learn that the information was based on selective release of misleading information from within the Commission by individuals linked to Ambassador Kiplagat.

Near the end of 2011 and into early 2012, new stories of financial mismanagement at the Commission surfaced in the press again. These stories were based on a confidential management letter that had been sent to the Commission by its external auditor. The letter from the auditors was a typical management letter – written after an initial review of the Commission's accounts and requesting clarification on a number of matters.

As part of the auditing process, and not the end of it, management letters do not provide a reliable indication of the state of an organisation's financial affairs.

Unfortunately copies of the management letter were leaked from inside the Commission to numerous media houses. Established media houses contacted the Commission and when the nature of the document they had been given was explained to them, they declined to publish the story. Some papers, however, did publish a series of stories alleging that the Commission's auditors had found massive fraud and corruption within the Commission.

In fact, the Commission had already responded to the management letter answering each of the queries raised by the auditors, which eventually resulted in an audit report that raised absolutely no concerns relating to financial mismanagement or improprieties, much less corruption. The Commission immediately posted the audit report on its website.

Even after the audit report was published on the Commission's website, the *Nairobi Law Monthly* printed a story based on the misinformed media reports

appearing several months earlier in segments of the alternative media commonly known as the gutter press. Even more disappointing was the fact that *Nairobi Law Monthly* did not contact the Commission for a comment, or try to verify its story. This was particularly unfortunate as the *Nairobi Law Monthly* went on to name specific Commissioners and staff members as having stolen money from the Commission. The ironic reality is that the Commissioners had in fact lent money to the Commission at a time when it had not received quarterly funding from the Treasury to enable the Commission to perform its core functions.

Those who reported on the matter misread the financial documents given to them – or were relying upon the interpretation of those documents given by individuals who wanted to harm the reputation of the Commission. Thus, those Commissioners who were the most generous were the ones most unjustly vilified in publications such as the *Nairobi Law Monthly*.

November 2011 to May 2012

In line with the TJRC Agreement, the TJR Act required the Commission to operate for a period of two years, 42 preceded by a three-month establishment phase.

The two-year operational period granted to the Commission was ambitious even in the best of circumstances, considering the breadth and complexity of the Commission's mandate. The Commission's material mandate was by far the broadest of any truth commission ever established, encompassing inquiry into violations of civil and political rights as well as socio-economic rights. Its temporal

As the end of the operational period approached, the Commission assessed the progress it had made in executing its mandate and the outstanding workload via its capacity.

The Commission concluded that it would be unable to finalise its work within the two years statutory limit.

By June 2011 the Commission had conducted hearings in North Eastern Province and partially in Western Province. With six (6) provinces to go and a series of other mandate operations that had not been executed, the Commission reached the considered opinion that it would not finalise its work within the

	<p>mandate was similarly wide, spanning December 12, 1963 to February 28, 2008, a period of just less than 45 years.</p> <p>Beyond the magnitude of the task the Commission faced several challenges and difficulties that had the effect of hampering its work and slowing implementation of its mandate.</p> <p>In particular, the Commission lost considerable time and credibility at the beginning of its term due to the controversy that surrounded the suitability of its Chairperson which lasted fifteen months from the appointment of the Commissioners in August 2009, to the stepping aside of the Chairperson in November 2010.</p> <p>The Commission also suffered financial and resource constraints that stalled its operations for the better part of its first year of operations. As a result, the Commission was not able to begin operating substantively and effectively until September 2010, a full year after its establishment.</p>	<p>remaining three months.</p> <p>Thus, on June 24, 2011, pursuant to section 20(3) of the TJR Act, the Commission requested the National Assembly to extend its tenure for a period of six months as expressly provided for by the Act.</p> <p>The National Assembly did not consider this request until two months later, on August 18, 2011 whereupon it voted to extend the Commission's term as requested.</p>
May to August 2012	<p>The second extension. Despite the fact that the Commission had been granted an extension, the outstanding workload remained enormous and demanding. Although it adhered to a compact timetable, the Commission concluded hearings in April 2012 having conducted 220 well attended hearing sessions during which more than 680 individuals testified before the Commission.</p> <p>In March 2012 when the Commission concluded its individual hearings, it had less than a month to finalise and submit its report. This proved to be an impossible task. The one month period was only sufficient to process transcripts</p>	<p>Faced with this challenge, the Commission requested that the three-month statutory winding up period provided to the Commission (May 3, to August 3, 2012) be reallocated to its operational period to give the Commission an additional three months to work on the report.</p> <p>Under the circumstances obtaining then, this was the best request that the Commission could make. To effect the request an amendment to the TJR Act had to be made.</p> <p>While the Commission expressed its request towards the end of April, it was only on 7 August 2012 that Parliament considered and approved the request. By that time, the relevant period over</p>

	<p>of hearings that the Commission had conducted in January and February 2012, leaving the key task of report writing undone.</p> <p>which an extension had been sought had already lapsed.</p> <p>In essence, the Commission operated in legal limbo for three months as it waited for Parliament to consider its request. Although the Commission continued to write its report during this period, the uncertainty over its legal status impacted negatively on its operations.</p> <p>Firstly, the Commission could neither conduct certain mandate operations (such as notifying adversely mentioned persons of their right to respond to allegations levelled against them) nor incur expenditures on mandate related operations.</p> <p>Secondly, the Commission suffered high turn-over of staff during this period. As a result, its capacity to operate at an optimal level was significantly reduced, especially as it had a lean staff complement to begin with.</p>
August 2012 to May 2013	<p>With a second extension, the Commission was expected to deliver its report on August 3, 2012. However, as it has been indicated above, Parliament did not consider the Commission's request for an extension until August 7, 2012.</p> <p>This was mainly due to the fact that the Commission was compelled to review its position on passing on various aspects of its mandate to the implementation mechanism to be established at the end of the life of the Commission.</p> <p>For the above reason, the Commission once again requested an extension of tenure to enable it finalise its report. On November 27, 2012, the National Assembly unanimously voted to extend the Commission's operational period to may 3, 2013.</p>
May 2013	<p>The four volumes of the final reports was officially were handed by the Commission to the newly elected President Uhuru, as well as for the public access.</p>

Source: (T.J.R.C., 2013: Vol. 1, pp.6-36.)

Table 5.2: The Mandate and Jurisdiction of the TJRC

The TJRC Agreement

The TJRC agreement spelt out the general parameters, guiding principles and the broad rules that would govern the creation and operation of the Commission. In particular, the following general parameters were agreed upon:

- A truth, justice and reconciliation commission was to be created through an Act of Parliament and adopted by the Legislature within four weeks.
- The Commission would inquire into human rights violations, including those committed by the State, groups or individuals. Such inquiry was to include but not be limited to politically-motivated violence, assassinations, community displacements, settlements and evictions. The Commission was also to inquire into major economic crimes, in particular grand corruption, historical land injustices and the illegal and irregular acquisition of land, especially as related to conflict or violence. Other historical injustices were also to be investigated.
- The Commission was to inquire into events which took place between December 12, 1963 and February 28, 2008. However, it was also mandated to look at antecedents to this period where necessary in order to understand the nature, root causes, and context that led to such violations, violence, or crimes.
- The Commission was to receive statements from victims, witnesses, communities, interest groups, persons directly or indirectly involved in events, or any other group or individual; undertake investigations and research; hold hearings; and engage in activities as it determined to advance national or community reconciliation. The Commission was permitted to offer confidentiality to persons upon request, in order to protect individual privacy or security, or for other reasons. The determination as to whether to hold its hearings in public or in camera was left to the sole discretion of the Commission.
- Blanket amnesty would not be provided for past crimes. Provision was made for the proposed commission to recommend individual amnesty in exchange for the full truth. Serious international crimes including crimes against humanity, war crimes, or genocide were not amnestied, nor were persons who bore the greatest responsibility for crimes that the Commission would cover.
- The Commission was to complete its work and submit a final report within two years. The final report was to state its findings and recommendations which would be submitted to the President, and made public within fourteen (14) days before being tabled in Parliament.

It was also agreed that the proposed Commission would reflect the following principles and guidelines, taking into account international standards and best practices:

- *Independence:* The Commission was to operate free from political or other influence. It would determine its own specific working methodologies and work plan, including those adopted for investigation and reporting. It would also set out its own budget and staff plan.
- *Fair and balanced inquiry:* In all its work, the Commission was to ensure that it sought the truth without influence from other factors. In representations to the public through hearings, statements, or in its final report, the Commission was to ensure that a fair representation of the truth was provided.

- *Appropriate powers:* The Commission was given powers of investigation, including the right to call persons to speak with the Commission and powers to make recommendations to be considered and implemented by the government or others. These recommendations could include measures to advance community or national reconciliation; institutional or other reforms, or whether any persons were to be held to account for past acts.
- *Full cooperation:* Government and other state offices were to provide information to the Commission on request, and to provide access to archives or other sources of information. Other Kenyan and international individuals and organizations were also urged to provide full cooperation and information to the Commission on request.
- *Financial support:* the parties were to encourage strong financial support to the Commission. The Government of Kenya was expected to provide a significant portion of the Commission's budget. Other funding could be obtained by the Commission from donors, foundations, or other independent sources.

On the composition of the Commission, the TJRC Agreement stated that:

- The Commission would consist of seven members, with gender balance taken into account. Three of the members were to be international. The members were to be persons of high moral integrity, well regarded by the Kenyan population, and to possess a range of skills, backgrounds, and professional expertise. As a whole, the Commission was to be perceived as impartial and no member was to be seen to represent a specific political group. At least two and not more than five of the seven commissioners were to be lawyers.
- In keeping with international best practices and to ensure broad public trust in and ownership of the process of seeking the truth, the national members of the Commission were chosen through a consultative process. The Commissioners were to be named no more than eight weeks after the passage of the Act that established the Commission.
- The three international members were to be selected by the Panel of Eminent African Personalities, taking into account public input.

Objectives and Functions of the TJRC

The objectives and functions of the Commission were respectively spelt out in sections 5 and 6 of the TJR Act. Although these objectives and functions were outlined in two separate sections of the Act, the Commission proceeded with its work with the understanding that both sections essentially related to its mandate and there were no strict distinctions between its objectives, on the one hand and its functions, on the other.

Section 5 of the TJR Act provides that 'the objectives of the Commission shall be to promote peace, justice, national unity, healing and reconciliation among the people of Kenya'. These objectives must be understood from a historical perspective, and particularly, in relation to both historical and immediate reasons leading to the formation of the Commission. Volume one of the TJRC Report recounted that history, but it must be emphasised here that central to establishing the Commission was the stark and painful realisation that Kenya's past and history could no longer be ignored or 'swept under the carpet'. The past had to be confronted.

Thus, when the Truth, Justice and Reconciliation Bill, 2008 (TJR Bill) was introduced in Parliament for debate, the Minister for Justice stated in her 'Memorandum of Objects and Reasons' that:

[...] The Bill is borne of the realisation that lasting peace and co-existence cannot prevail in Kenya unless historical injustices and violation and abuse of human rights have been addressed.

The Minister further explained that:

The Bill emanates from the deliberations of the National Dialogue and Reconciliation Committee which was formed after a political crisis ensued following a dispute on the outcome of the Presidential Election held on 27th December, 2007. The political crisis brought to the surface deep-seated and long-standing divisions within the Kenyan society and to heal those divisions, a raft of constitutional, legal and political measures to defuse the crisis were proposed, among them being the formation of a Commission to deal with historical injustices and violation of human rights. The establishment of the Commission was conceived with a view to addressing historical problems and injustices which, if left unaddressed, threatened the very existence of Kenya as a modern society.

The fact that the past had to be confronted was eminently clear to the National Assembly when it sat to debate the TJR Bill. In seconding that the Bill be read a second time, a member of the KNDR team indicated that:

[...] the events of the last General Election taught this country a lot of painful lessons. It has given us a chance to reflect on our past. It has become absolutely necessary to bring our past to some closure so that we can move ahead as a country. The Truth, Justice and Reconciliation Commission is the avenue through which Kenyans from all walks of life, and with truth, justice and reconciliation being their mission, come together to express themselves in this exercise so that they can bring their past to a closure and open a new chapter for us to move ahead as a country. It became clear that among the things that informed the near destruction of our country in the last General Election were issues that have been pending for a long time. There were historical injustices and prejudices that were informed by past events, deeds and actions by individuals, organisations and governments. It is necessary for us to bring that to a closure so that Kenya can exit from these prejudices and perceived or real injustices that were meted to the people of Kenya, thereby causing the mistrust that exists between our citizenry. The Bible says 'if you know the truth, the truth will set you free'. It is important for us to get to know the truth so that, as a country, we become free. It is important for the things that have been said about people and communities be known. The truth about government bodies, individuals and public officers must be known. The truth must be known so that we can set our country free. It is said that injustice anywhere is a threat to justice everywhere. It is, therefore, important for us, as a country, to deal with injustices that have been meted upon citizens of our country, whether they are perceived or real so that again we can live in a just society.

In addition to stating the objectives of the Commission, section 5 also indicated 10 ways by which those objectives should be achieved. When these modes of achieving its objectives were read together with section 6 of the Act, the Commission found it necessary to conceptually cluster its functions into four broad categories, that is, functions relating to: creating a historical record; victims, perpetrators; and the report.

On a Historical Records

Although the TJR Act does not create a hierarchy in relation to the functions of the Commission, it is noteworthy that the first two ways in which it envisaged that the Commission would execute its objectives is through the compiling of a historical record. In this regard, section 5(a) mandated the Commission to establish an accurate, complete and historical record of gross violations of human rights committed in Kenya by various state actors between December 12, 1963 and February 28, 2008. Section 5(b) mandated the Commission to establish as complete a picture as possible of the causes, nature and extent of violations of human rights. In this regard, the catalogue of specific violations that the Commission investigated is provided and discussed in detail further below.

On victims

Victims are at the heart of a truth-telling process and the operations of a truth commission. The process ought to give agency and recognition to victims. Ultimately, it should provide redress to victims. The process itself should be sensitive and humane.

According to the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims, 'victims should be treated with humanity and respect for their dignity and human rights and appropriate measures should be taken to ensure their safety,

physical and psychological well-being and privacy, as well as those of their families'. In this light and in keeping with international standards, sections 5 and 6 of the TJR Act mandated the Commission to carry out the following functions with respect to victims:

- Identify and specify victims of violations;
- Determine ways and means of redressing the suffering of victims;
- Provide victims with a platform for non-retributive truth telling;
- Provide victims with a forum to be heard and restore their dignity;
- Investigate into the whereabouts of victims and restore their dignity; and
- Recommend reparation measures in respect of victims.

The Commissions faithfully performed these functions. On identifying and specifying victims of violations, the Commission has compiled and published in this Report a list of victims of various violations committed during its mandate period. The list contains the names of victims who submitted their cases to the Commission and as such, it is not a complete list of all people who suffered violations during the mandate period. In relation to determining ways and means of redressing the suffering of victims, this report contains a catalogue of recommendations aimed at repairing the harm suffered by victims. The Commission's measures intended to ensure that victims have a platform for non-retributive truth-telling are discussed in detail in the next chapter.

In a nutshell, the Commission held various forms of hearings which provided victims with the opportunity to narrate their stories and in the process restore their dignity and commence a healing process.

On perpetrators

While victims are at the heart of a truth-telling process, the involvement of alleged or actual perpetrators is equally important for optimum success of the process. Firstly, for a complete and accurate story of violations, the perspectives of both victims and perpetrators are a requisite. For this reason, section 5(a) of the TJR Act required the Commission to record the 'motives and perspectives of the persons responsible for commission of the violations'. Secondly, inter-personal reconciliation between a victim and a perpetrator is by necessity dependent on the participation of both parties. Of course, a victim may reconcile with his situation and even forgive the perpetrator without the two ever meeting, but the benefits of a healing and reconciliation process are maximised when both parties have a joint forum for constructive engagement.

For these reasons, the TJR Act mandated the Commission to provide perpetrators with a platform for non-retributive truth telling and a forum to confess their actions as a way of bringing reconciliation. However, knowing that a careful balance must be struck between reconciliation and justice, the drafters of the TJR Act also recommended that the Commission should determine perpetrators of violations and where appropriate recommend their prosecution. The Act also mandated the Commission to facilitate the granting of conditional amnesty to perpetrators who make full disclosure of their involvement in violations. The Commission's approach in relation to this specific mandate relating to amnesty is discussed in detail later in this chapter.

In respect to determining perpetrators of violations, the Commission has published in this report names of individuals who were alleged to have committed gross violations of human rights during its mandate period. The Commission received allegations against 54,000 individuals. However, the list of alleged perpetrators contained in this report is only limited to those who were afforded an opportunity to respond to allegations levelled against them. Due to limited resources and time constraints, the Commission could not notify all alleged perpetrators of the nature of allegations raised against them. As such, the Commission had

to prioritise its work in relation to sending out notifications to alleged perpetrators. The criteria used included looking at the gravity of the violations and the frequency of an individual's appearance in the Commission's database as a perpetrator.

On the report

The functions of the Commission in relation to preparing this Report were outlined under sections 5(j) and 48(2) of the TJR Act. In essence, the law expressly required the Commission to do two main things in this report: document its findings and make recommendations flowing from those findings. The Act stipulated that the recommendations of the Commission should include the following:

- Recommendations for prosecution
- Recommendations for reparation for victims
- Recommendations on specific actions to be taken in furtherance of the Commission's findings
- Recommendations on legal and administrative measures to be taken to address specific concerns identified by the Commission
- Recommendations relating to the mechanism and framework for the implementation of its recommendations and an institutional arrangement.

Due to the numerous yet interrelated issues that it was called upon to document, the Commission grappled with how best to structure this Report. Several options were scrutinised and after lengthy discussions, the current structure was adopted.

Temporal Mandate

The Commission's temporal mandate was one of the least understood aspects of its mandate despite efforts by the Commission to educate the public on this subject. This situation arose because up until its formation, disagreements were still rife as to which period the Commission should cover in its inquiry. Before the Task Force on the Establishment of a TJRC, a considerable number of people were of the opinion that a Kenyan truth commission should have a temporal mandate dating back to 1895 when the boundaries of what is now Kenya were demarcated. In essence, there are those who wanted the envisaged commission to address violations and atrocities committed during the colonial period. The Task Force, while agreeing that the colonial period was marked by unspeakable atrocities, rejected the idea that a truth commission should inquire into issues dating as far back as 1895. The Task Force explained its position thus:

First, that period (1895-1963) is too remote in time, and the questions that it raises are too complex for a transitional justice instrument like a truth commission. Evidence would be scant; many of the perpetrators are long dead or are in the United Kingdom. Secondly, the answerable power is not Kenya, but the United Kingdom, and truth commissions are not generally established to investigate a remote, departed power. Finally, extending the truth commission to the colonial period would be an impossibly expensive, laboriously prohibitive, and practically unmanageable exercise. For these reasons, the Task Force rejects 1895 as an impracticable time-line, and instead recommends that the Kenya government sets up a less ambitious vehicle, such as a committee of eminent Kenyans to examine a limited set of issues relating to the colonial period.

For the colonial period, the Task Force recommended that 'a less ambitious vehicle, such as a committee of eminent Kenyans' be constituted for purposes of examining 'a limited set of issues relating to the colonial period'. For the truth commission, the Task Force recommended that its temporal mandate be limited to the independence period. It offered four reasons for this position:

The Task Force therefore is of the view that a truth commission ought to cover the period from 1963 to 2002, the post-colonial era and the period KANU ruled the country [...] the reasons for this choice, which the Task Force endorses, are rational, compelling, and unassailable. First, the period combines the first and the second regimes under KANU, and as such cannot be said to be selective

or directed at any particular community. This is important because a truth commission cannot be legitimate if it appears to be an instrument to settle scores against a particular former regime, community or individuals. Secondly, the post-colonial period is very present, and not remote. Many of those who served in the independence government are still alive. Thirdly, it stands to reason that Kenyans ought to rightly audit their own state, not the colonial British state. Fourth, the human rights violations and gross economic crimes that the majority of Kenyans want investigated were committed over the last forty years. Lastly, the investigation span of the last forty years is financially feasible and defensible, practical, and could be carried out within a two-year period. It is for these reasons that the Task Force recommends that a truth commission cover the period from December 12, 1963 to December 31, 2002.

As described in the previous Chapter, the recommendations of the Task Force were never followed through. However, when the question of establishing a truth commission returned to the table under the KNDR process, the issue on the temporal mandate of the commission returned with it too. Perhaps, acknowledging that there were still some agitating for the colonial period to be the subject of inquiry, parties to the TJRC Agreement decided to limit the commission's mandate to the independence period but they also agreed to give it room to look into events prior to this period. According to the Agreement:

The Commission will inquire into such events which took place between December 12, 1963 and February 28, 2008. However, it will as necessary look at antecedents to this date in order to understand the nature, root causes, or context that led to such violations, violence or crimes.

In terms of the TJRC Agreement, the TJR Bill delineated the Commission temporal mandate to focus on the post-independence period, from 12 December 1963 when Kenya got its independence to 28 February 2008 when the National Accord was signed. But it also clearly indicated that the Commission would be empowered to look into the colonial period in as far as this period was relevant for understanding 'antecedents, circumstances and context' of violations committed after independence. When the Bill was introduced in Parliament, the Minister for Justice explained the proposed temporal mandate of the Commission in the following words:

Clause 5 gives the objectives of the Commission as to promote peace, justice and national unity, healing and reconciliation among the people of Kenya. The Commission will, therefore, be establishing an accurate, complete and historical record of violation and abuses of human rights and economic rights inflicted on Kenyans by the state, public institutions and holders of public office, both serving and retired, between 12th December, 1963 and 28th February, 2008.

These two dates are significant. 12th December 1963 is when we attained Independence while February 28, 2008 is the date when the National Accord was signed. So, we want to examine how we have dealt with each other as an independent state. However, Clause 5A (i) recognises that we may need to go beyond 12th December 1963 to the antecedents, circumstances and factors so as to contextualize such violations. If we need to go beyond 12th December 1963 to discover the genesis of the problem, the proposed Clause 5B does indicate that we can go as far back as possible in order to establish a complete picture of the causes, nature and extent of the gross violation of human and economic rights committed between the period I have stated and including antecedents and circumstances.

Despite the above clear explanation, some members of Parliament still proceeded to lament that the proposed temporal mandate was too limiting to the extent that the colonial period was not covered. The words of Njeru Githae, then an Assistant Minister of Local government, are instructive in this regard:

It is unfortunate that we have come up with the date of 12th December 1963 when Kenya attained Independence. If I would have been asked, I would have said we need to go backwards to when Kenya as a nation we know today, first existed. I would have gone back to 1895. This is the time that some of the so-called historical injustices started. I have talked of the year 1895 because before then, Kenya, whether a colony or a protectorate did not exist. This then would have given Kenyans an opportunity to go as far back as memory can remember. This would give the basis for the so-called

historical injustices. Some of the so-called historical injustices are actually a result of colonialism.

After clarifications, those who harboured fears such as is quoted above came to understand that the envisaged commission could inquire into the colonial period. No changes were, therefore, made to the clauses in the TJR Bill relating to the temporal mandate of the Commission. Thus, in the TJR Act, the first part of the relevant sections mandates the Commission to investigate violations of human rights that occurred in Kenya between 12 December 1963 and 28 February 2008.³⁸ The second part mandates it to look into ‘antecedents, circumstances, factors and context’.

Notwithstanding the clear authority, even obligation, in the Act to examine the pre-independence period for the root causes of the violations committed since independence, many Kenyans remained under the impression that the temporal mandate of the Commission strictly covered the period between December 12, 1963 and February 28, 2008. For instance, in a letter to the Chairman of the Parliamentary Committee on Administration of Justice and Legal Affairs, the Release Political Prisoners Trust sought the review of the TJR Act because they claimed, amongst other reasons, that:

It ignores a crucial and critical part of the Kenyan history. It starts from 1963, yet some of the root causes of the issues that date back to the colonial era are not covered in the Act. Kenyans need to know why the period before independence is being left out of the TJRC and why some Kenyans have been left out of the process, yet they have the living testimonies and memories of the history and real life experiences; not allegations. To us, the scope on the search for justice through TJRC should cover the history of our country as a whole.

The Kenya National Liberation War Veterans Association expressed similar sentiments. In a submission to the Commission, the association lamented that:

The TJRC Act of 2008 excludes the colonial period. Hence our members ranging from 3,500 are being left out in the truth-telling process of our country; being left out of this process leads to suffocation of Kenyan history and what haunt[s] us as a nation up to date.

Indeed, similar concerns became one of the grounds of a suit seeking the dissolution of the Commission. As discussed in detail in Chapter Four of this Volume, the applicants in the case of *Augustine Njeru Kathangu & 9 Others v TJRC and Bethuel Kiplagat* challenged the statutory mandate of the Commission, arguing that the TJR Act was defective and unconstitutional to the extent that it excluded the periods before December 12, 1963 and after February 28, 2008 from the Commission’s temporal mandate. The court dismissed the contention on a technical ground, though in doing so it incorrectly accepted the underlying assertion that the Commission was precluded from looking at events before or after the prescribed temporal mandate:

We note that the *ex parte* applicants are concerned with human rights violations which occurred prior to 12th December 1963 and after 28th February 2008, which are not covered under the TJRC Act. It is arguable as to whether the legislature was right in excluding those violations. This issue and other equally pertinent issues which have been raised can only be determined in a properly pleaded case, preferably in a constitutional reference.

In addition to raising concerns about the perceived legal inability for the Commission to inquire into events that occurred during the colonial period, some people went further to assert that the Commission’s mandate should have been extrapolated to cover the period after 28 February 2008. For instance, in its letter already alluded to above, the Release Political Prisoners Trust argued that:

The [TJR] Act also ignores the period after February 2008, when other human rights violations took place, especially the killing of human rights defenders GPO and Oscar King’ara of Oscar Foundation on March 5 2009 and the recent Mathira killings among other happenings that leave questionable marks on their intentions and purposes, alienating sections of Kenyans who keep on crying for

justice.

This was an erroneous assumption. But first, it must be emphasised that being a temporary body, a truth commission must have a time-bound mandate. Its focus should be on past violations, as has been the case with all truth commissions across the world. The role of investigating ‘new’ and ‘current’ violations traditionally rests with permanent bodies such as the police department or national human rights institutions. Occasionally, commissions of inquiry are constituted to investigate particular current events or violations.

With these caveats in mind, the Commission nevertheless proceeded with its work with the understanding that it could, in certain circumstances, inquire into events that occurred after February 28, 2008. Firstly, borrowing *mutatis mutandis* from the ‘continuing violations’ doctrine developed by human rights treaty bodies, the Commission could extrapolate its mandate beyond 28 February 2008 if a violation under its inquiry was a continuing violation. That is, the violation commenced during the mandate period but continued after that period. For example, some of the people displaced during the 2007-2008 Post-Election Violence remain in camps and have not been compensated for their losses. As such, the Commission required all individuals filling out a Statement Form to indicate whether the violation they were recording was a continuing violation.

Secondly, the Commission was expressly mandated to ‘investigate any other matter that it considers requires investigations in order to promote and achieve national reconciliation’. Therefore, notwithstanding that a violation or event occurred after its formal mandate, the Commission could investigate it, provided that such an investigation was necessary for the promotion and achievement of national reconciliation. Moreover, from a pragmatic point of view, it was important for the Commission to constantly take into account current developments which could impact on its work.

Despite the many concerns raised about its temporal mandate, when the Commission undertook its civic education campaigns and explained its mandate, many came to understand that the temporal mandate of the Commission was flexible and that its inquiry was a contextual one that required all events to be taken into account including those that had occurred prior to and after its formal mandate period.

Source: (T.J.R.C., 2013: Vol. 1, pp.39-62.)

D - When Justice Remains Elusive: the TJRC in Kenya

From the above timetables, several important features of Kenya’s TJRC can be deduced here.

As has been eloquently argued by David Forsythe, transitional justice is not solely concerned with prosecution, but also with truth commissions (2011: p.576). As such, the primary reason for why Kenya initiated various ‘complex rituals’ is because the TJRC and the ICC were necessary to healing the body politic, ‘the cleansing they produce of the body politic is necessary for the succeeding regime to start its mandate with a clean slate’ (p.576). Until recently, the debate about utilising restorative justice mechanisms has been renewed in the context of responding to post-election violence; the said mechanisms have become

controversially associated with ongoing democratic struggles, rather than signifying a transition or regime change (see Brown, 2013; Hayner, 2011; Vandeginste and Sriram., 2011).

In Kenya, the TJRC has been utilised to address impunity

Today, the choice of public truth-telling or punitive justice has been replaced by a new package approach that views truth telling, prosecution and reparations as complementary processes that can and should occur concurrently. This is evident in Sierra Leone, where TRC – based largely on the South African model – ran alongside the Special Court for Sierra Leone, and also in Kenya, where the country's on-going Truth, Justice, and Reconciliation Commission (TJRC) has run parallel to International Criminal Court (ICC) investigations...(Lynch, 2012/2013: p.130)

While the TJRC is supposed to run concurrently with the ICC, the reality is that the initial establishment of the TJRC has been compromised by the ruling class' attempt to replace demands for criminal accountability and investigations with the implementation of restorative justice (Chapter 3). In line with special issues of the *International Journal of Transitional Justice* (2008), in which various scholarly works examined the interaction between peacebuilding and transitional justice, one of the TJRC advocates in Kenya has suggested the importance of its proceedings and final reports in calling for a wider recognition of the issue of economic injustice and land reforms (see Musila, 2009a). Of course, Musila was not able to make this suggestion without substantive criticism from commentators who call for a more pragmatic reconsideration of various unrealistic nation-building goals that, owing to the shortcomings of the TJRC, have not been met (Bosire, 2006: pp.1-5).

Indeed, a resettlement scheme involving the purchasing of new land for the IDPs has been impeded by illegal land acquisitions and land-related disputes (Manji., 2012: p.468; Southall, 2005: p.149). The scheme has also been hampered by new illegal land transfers by the MPs, in which land that was reserved for the settlement scheme has not been granted to many of the

IDPs who are still living at the camps (Elhawary, 2009: p.135; Robinson, 2011: p.7). ‘They promised land, but we were forced to resettle at the slums’ (interview with IDP no. 76, Rift Valley, March 14, 2013). Even those who participated in the TJRC public hearing session on land injustice issues have remained homeless (interview with IDP no. 77, Rift Valley, March 14, 2013). Hence, the displacement camp has become a permanent symbol of resistance, not because the IDPs refused to resettle, but because they were forced by local authorities to evacuate the camps and move to nearby slums in Nairobi, which transformed their economic status from that of ‘displaced victims’ into ‘homeless citizens’ in the urban slums (Gallaher et al., 2013: p.395).

Fearing to create new types of land disputes that could displease the local politicians, the authorities swiftly closed the major camps and forced the displaced victims to resettle in slums while their demands for reparation remained contested (Shutzer, 2012: p.357). The real danger of utilising TRCs to address economic injustices and national developmental issues, as suggested by Huggins (2009), Kioko (2002), Musila (2009a) and Nagy (2012), is that it ignores the establishment of judicial commissions that actually specialise in land tenure reforms; truth commissions established in illiberal democratic environments (such as those of Kenya, Sierra Leone, Zimbabwe and Burundi) are not equipped to address land grievances (see Lynch, 2013a; Millar, 2010; Rutherford, 2012; Taylor, 2013).

Ironically, while the broad-based focus of the historical injustice including land and other socioeconomic issues are explicitly discussed and attached to the TJRC final recommendation on reparations, the report itself indicated the reality of its temporal jurisdiction and the

existence of more relevant institutions or commissions to deal with such long-term agendas that beyond the scope and probe of the TJRC (see Table 5.3).

Table 5.3 Excerpts from the TJRC Final Report, Volume 4

- In thinking about and formulating recommendations, the Commission took note of the fact that the Commission was established as part of the Kenya National Dialogue and Reconciliation process which led to the initiation of numerous reforms and mechanisms intended to address long-standing historical issues. As a consequence, many of the issues that the Commission was tasked to address have been addressed (either in whole or in part) or are in the process of been addressed. For instance, the Constitution of Kenya 2010 has dealt with or laid the basis for addressing such issues as historical land injustices and economic marginalization.
- The Commission was also aware that there have been established in recent time a number of permanent institutions charged with dealing with the very issues that the Commission was mandated to inquire into. These include:
 1. The National Land Commission, which has the mandate to deal with, among other issues, historical land injustices;
 2. The National Cohesion and Integration Commission, which has the mandate to foster national cohesion and unity;
 3. The National Gender and Equality Commission, which has the mandate to promote and protect the rights of minority and vulnerable groups, including women and marginalised groups;
 4. The Ethics and Anti-Corruption Commission, which has the mandate to investigate cases of corruption and economic crimes;
 5. The Commission on Revenue Allocation, which has the mandate to determine allocation of revenue; and
 6. The Independent Police Oversight Authority, which has the mandate to, *inter alia*, inquire into killings committed by the police.
- In essence, the Commission's work evolved at a particular historical moment that coincided with a reform process. Thus, the Commission viewed its role as that of building on the existing reform initiatives.
- Like truth commissions before it, the Commission had to consider whether or not to recommend lustration. The term lustration is derived from the Latin *lustrum* and refers to a process of purification. In the field of transitional justice, the process of lustration has been used to remove from public office individuals who are associated with past human rights violations. It has also been used to prevent individuals associated with human rights violations from holding public office in the future.
- The United Nations recognise the important role that vetting and lustration can play in the prevention of future human rights abuses and violations by the State. Lustration can serve two purposes: preventing the recurrence of human violations by public officers who have committed such violations in the past, and restoring the population's trust in the State after a period of systematic human rights violations.
- The process of lustration has been controversial in many societies when it has been used to remove from office all individuals associated with past political regimes. For example, lustration has been used in former communist countries to remove all individuals associated with the past communist regime, and in Iraq to remove all

officials associated with the deposed Baath Party. In the context of Kenya, this kind of mass action is not recommended.

- However, the prevalence of impunity throughout the history of Kenya compelled the Commission to consider lustration for past abuses committed by individuals while acting in an official capacity. The Commission considered that tackling impunity is a necessary and urgent step in the full restoration of the rule of law in Kenya, in establishing lasting peace and stability, and in fostering reconciliation. For this reason, the Commission has recommended that specific individuals should not hold public office in Kenya's constitutional order on account of their past conduct and/or decisions which resulted in gross violations of human rights.

Source: (T.J.R.C., 2013: Vol. 4, p.8.)

As such, while during the author's viva of his doctoral thesis, the external examiner raised the issue of considering the broad-based focus of the justice demands by the IDPs as one of the ways to recognise the relevant needs of broad mandates focuses by the TJRC, yet the author remained skeptics on the inability of the commission to fulfill such ambitious tasks. In short, is not whether the transitional justice institutions that were established in Kenya satisfies all the IDPs' demands of justice, but whether even in such realistically limited pursuit of prosecution and reparation, some of the major demands will be considered and eventually implemented. As hinted above, not only this overlapped with the existing and other permanent institutions that more directly relevant to address such wider scopes, but most importantly, it overstretched the already burden of the TJRC's mandate and jurisdiction, and at worse, ignores the political reality of Kenyan politics. The reality that the main challenge of the transitional justice institution in this country is not whether there is or not a huge numbers of legal and non-legal bodies to sanction the state leaders' unacceptable of political and legal behaviours, but a political constrained that were conditioned by the ruling class brinkmanship games upon the transitional justice institutions.

Furthermore, the above excerpt highlight the fact that the TJRC recognised the entrenched culture of impunity and the commission proposes the idea of lustration or vetting the identified officers from their public services, which means without doing so it only reinforced the wider public perception of the state refusal to be disciplined or ‘punished’ for their crimes and unacceptable political, moral and legal behaviours while running the public office.

In such instances, the final reports produced by the commissions caused a proliferation of more land disputes among the ruling class, while the IDPs were forced to resettle at the slums. ‘While elephants fight, we stink like rats’ (interview with IDP no. 13, Rift Valley, February 10, 2012). ‘Ask any of the IDPs, and they will confirm that their human security is being compromised by the daily fear of violence and being evicted from their families’ lands’ (interview with USAID officer, Nairobi, February 15, 2012).

From their initial position as landless victims to their later status as ‘slum citizens’, their unaddressed grievances regenerated the diffusion of urban violence, informal markets and criminal groups (LeBas, 2013: p.257). As such, further attempts to utilise the TJRC in resolving broader issues of economic injustice, land reforms, underdevelopment and corruption only signified transitional justice as ‘a paradox of success’, in that the more one expects it to deliver, the more likely it is that transitional justice will produce minimal results (Balasco, 2013: p.198).

Given the paradox of success currently embodied by the TJRC in Kenya, the current focus on demands for compensation are likely to ensure its failure. This is what occurred in Haiti and

Timor Leste in relation to the similar focus of the national elite on broader economic injustices, and their political attempts to hijack the TJRC proceedings (see Karanja, 2010). After three requests to extend the deadline had been made, the TJRC finally completed its six volumes of reports in May 2013. The release of its final report elicited a variety of responses, and in the following Table 5.4, the overall recommendations of the TJRC report findings can be summarised as follows:

Table 5.4 The General Recommendations of the TJRC Final Reports, 2013

Recommendations

- The Commission recommends that the President, within six months of the issuance of this Report, offer a public and unconditional apology to the people of Kenya for all injustices and gross violations of human rights committed during the mandate period.
- The Commission recommends that State security agencies, and in particular the Kenya Police, Kenya Defence Forces, and the National Intelligence Service apologize for gross violations of human rights committed by their predecessor agencies between December 12, 1963 and February 28, 2008, especially acts of extra-judicial killings, arbitrary and prolonged detention, torture and sexual violence.
- The Commission recommends that the Kenyan Government considers entering into negotiations with the British government with a view to seeking compensation for victims of atrocities and injustices committed during the colonial period by agents of the colonial administration. This should be done within 12 months of the issuance of this Report.
- The Commission recommends that the British government offer a public and unconditional apology to the people of Kenya for all injustices and gross violations of human rights committed by the colonial administration between 1895 and 1963.
- The Commission recommends that the Judiciary apologise to the people of Kenya for failing to address impunity effectively and perform its role of deterrence to prevent the perpetration of gross human rights violations, during the period between December 12, 1963 and February 28, 2008.
- The Commission recommends the creation of a National Human Rights Day on December 10, to coincide with the international Human Rights Day, which will be used to promote respect for human rights in Kenya.
- The Commission recommends that the judiciary fast-tracks the establishment of the International Crimes Division of the High Court which shall be responsible for the trial of some of the cases referred to the Director of Public Prosecutions for investigations and prosecution.
- The Commission recommends that the fast-tracking of the enactment of human rights related laws as envisaged by the Constitution of Kenya, including on: freedom of the media; fair hearing; and rights of persons held in custody or detained.
- The Commission recommends that the government makes a declaration in terms of article 34(6) of the Protocol to the African Charter on Human and Peoples' Rights

on the Establishment of the African Court on Human and Peoples' Rights thus allowing individual victims of human rights violations who have exhausted local remedies to directly access the African Court.

- The Commission recommends that the Ministry of Justice fast-tracks the expansion of the national legal aid scheme to cover the entire country.

Source: (T.J.R.C., 2013: Vol. 4, p.9.)

The commission collected 42, 465 testimonials and an additional 1529 memoranda from 9 regions, including the refugee camps in Uganda (T.J.R.C., 2013: Vol. I, pp.83-8). However, only a select number of witnesses were allowed to testify at the public hearing sessions (pp.89-122).

Table 5.5: Statements Distributions by Region and Gender				
Region	Male	Female	Unknown	Total
Central	1778	1578	6	3358
Coast	2455	1079	13	3547
Eastern	3467	1775	7	5249
Nairobi	832	947	2	1781
North Eastern	2883	1307	2	4129
Nyanza	2606	1828	7	4437
Rift Valley	7211	4698	23	1932
Western	3934	2890	8	6832
Not Given	649	405	83	1137
Gran Total	2581	16503	151	42465

Source: (T.J.R.C., 2013: Vol. 1, p.87.)

In summary, the TJRC faced three major problems, which suggests the disconnection of its proceedings from members of the public, especially the IDPs. First, the body faced an initial legitimacy crisis when a former diplomat from the era of President Moi, Bethuel Kiplagat, was appointed by the government to chair the commission (T.J.R.C., 2013: Vol. I, pp.124-43). Critics argued that, for his alleged responsibility for the impunity of previous governments, Kiplagat should be subject to a TJRC investigation of his own rather than being made chairman of the commission (Lynch, 2012/2013: p.131). Some raised concerns that he was appointed to the post by the government as part of its attempt to doctor the commission's works, as was the case in the government's endorsement of the 2005 constitutional draft (interview with IDP no. 78, Rift Valley, March 14, 2013).

Secondly, like many TRCs throughout the globe, the TJRC had to deal with serious financial shortages, which resulted in the pending of its critical proceedings (T.J.R.C., 2013: Vol. I, pp.144-47). In addition, the lack of external funding was also owing to the international donors' and civil societies' (CSO) concerns about the initial legitimacy crisis faced by the TJRC, and this inevitably diverted the primary focus onto convincing members of the public about its credibility, rather than conducting the investigation (p.148).

Thirdly, the TJRC issued a nearly impossible mandate, which covered a wide range of violations over the 45 years prior to the 2008 crisis and the two years subsequent to it (Musila, 2009a: p.460). The CSOs criticised the fact that the overly ambitious mandate for largely ignoring the recent atrocities that were committed by various senior members of the incumbent government (interview with NPI officer, Kenya, March 10, 2012). At the time of writing, the TJRC has successfully completed its six volumes of reports.

The author's observations of its proceedings, his analysis of its final reports and the conversations he conducted with many of the IDPs who observed the TJRC's proceedings confirm that the commission has generally received a lack of positive responses from IDPs, as a result of the overly ambitious scope of its mandate in documenting systematic violations and impunity (see Table 5.6).

Table 5.6: Summary of TJRC Final Reports, 2013

Volumes	Major Themes	Comments
I	A general summary of the objectives and scope of the commission; its work and research methodology, the	The commission's adoption of particular mechanisms was informed by the adoption of various similar non-judicial

	<p>structure of the organisation, its budget review, the major challenges that it faces and its limitations in dealing with these challenges; the legal/political definition of the terms used by the TJRC.</p> <p>mechanisms worldwide, especially by South Africa's TRC.</p> <p>Terms like transitional justice, retributive justice, restoration, reparation and reconciliation were defined based on the customary and treaty-based sources of public international laws, as well as the works of various existing commissions across the globe.</p> <p>The commission is aware of the general key debates surrounding the literature of transitional justice, and therefore has not raised any substantive issues in relation to cultural peculiarity. It is to be assumed that the TJRC's works will be accepted and implemented based on the government's idea of <i>bona fide</i> policy. It is plausible that the government used the report as a justification for challenging the ICC's proceedings in Kenya, which suggests that the government's commitment to following the report's recommendations constitutes a sufficient alternative to the limited scope of the ICC's prosecution. This serves as a prime example of how the government has succeeded in manipulating the ICC's proceedings, but has failed to address the immediate needs of the victims.</p>
II A	<p>A consideration of the historical (structural) and key recent (agency-based) events that account for the political violence, extra-judicial killing, state-related torture and other violations that have been perpetrated since the colonial era, and which</p> <p>While such a comprehensive analytical approach may seem interesting, the TJRC report is not tasked with writing a history book. Rather, it should be viewed as a political jack-of-all-trades, but master of none.</p>

<p>continued up until the December 2008 crisis.</p>	<p>The TJRC report covers a very wide timeframe, but possesses limited political, legal and financial resources for addressing various instances of political, criminal and civil violations.</p> <p>Nothing is new; the report relies on repeating the findings of existing and previous parliamentary and judicial inquiry commissions on top-profile political assassinations, without providing any substantive evidence or supports from secondary literature. Can such findings be accepted as a valid form of evidence by the national court in its conducting of further investigations, and will the state be willing to comply with such a request?</p>
<p>II B The discussion of themes of economic marginalisation and economic violations.</p>	<p>This is the most ambitious component of the TJRC; nonetheless, it is a shortcoming similar to that of other TRCs, such as those of Timor Leste, Haiti and South Africa.</p> <p>These economic objectives also overlap with the tasks undertaken by the Land Reform Commission. Various previous anti-corruption and land inquiry commissions have failed to secure a minimum degree of implementation from previous governments.</p> <p>What is the likelihood of successful land policies and other economic solutions being implemented by such ad-hoc mandates of the TJRC if other more permanent commissions have failed to follow even the basic recommendation of</p>

		<p>resolving disputes that have arisen from illegal land grabs made by national politicians?</p> <p>What is the actual, identifiable mechanism that can be identified from the findings of these volumes, and how can it be integrated into the existing mechanisms adopted as part of the various domestic policies undertaken by the government? What is the likelihood that the implementation of these recommendations will satisfy the popular demand for democratization at the expense of weakening democratic and judicial institutions?</p>
II C	<p>An analysis of gender-based violence, and the rights of women, children, disabled persons, ethnic minorities and indigenous peoples.</p>	<p>While the new constitution has incorporated the bill of rights and other international human rights documents, it remains to be seen whether the translation of the language of these documents into an international and vague language of rights can be incorporated into a practical set of municipal regulations and government policies.</p> <p>Considering that the political and legal concerns that were raised by this volume's findings are not the immediate priority of the reconciliation commission, when can victims realistically expect to receive compensation from the state? What actual mechanism will the state use to compensate such a huge number of material requests from such diverse sections of the population?</p>
III	A consideration of the issues of	Again, there is nothing new about the

	<p>ethnic conflict and its impact on national cohesion and reconciliation.</p> <p>findings; they merely confirm the assertions of various secondary literatures that negative ethnicity is persistently used as a political instrument for debating national identity in Kenyan politics. The findings only reinforce existing ethnic stereotypes in Africa, and may only be visible as a form of public education or historical reflection.</p> <p>What is the likelihood of these findings being able to prevent the cycle of violence impelled by negative ethnicity from recurring in the future? A few months after the release of the reports, the local politicians utilized the TJRC's public hearing sessions to project a discourse of negative ethnicity. This lead to the renewal of violent conflict between pastoralist and agriculturalist groups in the Tana Delta. Did the public actually learn anything useful from this?</p>
IV	<p>The final volume invoked the legal obligation to act on all of its findings, as recommended by the TJRC statute enacted by parliament.</p> <p>The drafting of specific legal bills to be considered by the national assembly (parliament) in its attempt to endorse all its findings and recommendations.</p> <p>Will the government uphold its commitment to implementing the overall findings?</p> <p>Will the specific six month timeframe for fully implementing its findings be enough?</p> <p>What is the government's response to various politicians' legal suits filed in an attempt to freeze the implementation processes? What will be its response to the MPs' private motions to make the implementation of the TJRC statute optional rather than mandatory?</p>

Interviews conducted by the author revealed a general sense of disappointment among various individuals involved in testifying at the TJRC hearing sessions about the realistic implementation of the crucial recommendations.

What is the likelihood of the more unrealistic recommendations being met, such as the requesting of more material compensation from the UK government for historical violence perpetrated by former colonials in the wake of the recent *Mau Mau* case, and the huge amount of financial compensation that must be dispensed by the government?

Source: Compiled by Author

The crime of impunity has been acknowledged, and the TJRC has taken the bold step of specifically naming various top profile government individuals who will be subject to further legal investigation.

However, many have expressed their anxieties about the country's unprecedented records of commission inquiries that have scarcely been implemented, or not implemented at all (interview with IDP no. 79, Rift Valley, March 14, 2013). Further comparisons of the reports with previous inquiry reports prior to the 2008 crisis have confirmed that the commission only 'narrates' similar issues of human rights and recommendations that were raised by previous commissions (fieldwork note no. 4, Rift Valley, April 7, 2013).

The TJRC 2008 statute empowered the commission to authorise future investigations, to force the government to comply with its recommendations, and to allow any Kenyans to seek judicial review and demand explanations from the Minister of Justice if the TJRC did not meet the recommendations of the statute within the minimum deadline of between 6 and 12 months (T.J.R.C., 2013: Vol. IV, pp.72-96).

Table 5.7: Excerpts from the TJRC Act	
Recommendation Scope	Legal Source
<p>The Commission shall submit a report of its work to the President at the end of its operations. The Report shall:</p> <ol style="list-style-type: none"> summarise the findings of the Commission and make recommendations concerning the reforms and other measures, whether legal, political, or administrative as may be needed to achieve the object of the Commission; make recommendations for prosecution; recommend reparation for the victims; recommend specific actions to be taken in furtherance of the Commission's findings; recommend legal and administrative measures to address specific concerns identified by the Commission. 	<p>Truth, Justice and Reconciliation Act, Section 48(1) & (2)</p>
<p>All recommendations (of the Commission) shall be implemented, and where the implementation of any recommendation has not been complied with, the National Assembly shall require the Minister to furnish it with reasons for non-implementation.</p>	<p>Truth, Justice and Reconciliation Act, Section 50(2)</p>

Source: TJRC Act 2008

However, six months after the release of the final the report, the TJRC has not only failed to meet any of the substantive recommendations, but various legal suits and injunctions have been filed against the TJRC by various politicians and retired civil servants (Shiundu, 2013). The legal injunctions as stipulated by the 2008 Act were abused by many (especially those who were specifically named in the report) in an attempt to stop the TJRC from meeting the

compulsory recommendations of criminal investigation and reparation fulfillment (Freedom House., 2013).

In this regard, the TJRC's proceedings suffered from a similar level of popular discontent faced by the TRCs of other nations in relation to the crucial recognition of 'nuts and bolts' considerations, including continuous and generous funding, coherent administrative management and workloads, the active support of CSOs, the reasonable scope of the mandate and the timeframe in which to fulfil it (see Hayner, 2011). What remains to be seen is whether the TJRC will successfully fulfil its mandate (see Table 5.1). It also remains unclear as to whether the needs of such public hearing mechanisms have been legally defined rather than politically pursued, and whether the commissions final works can be perceived as a 'ritual cleansing' that signified the government of the day's acknowledgement of past atrocities and its commitment to addressing them; or whether it has simply employed a 'popular buy-in' strategy to deflect the acknowledged call for punitive justice and criminal accountability (interview with IDP no. 80, Rift Valley, March 14, 2013).

E – Preaching Peace to Defy Criminal Justice

'Political violence not only terrorizes through actual injury or fear but also traumatizes by inscribing the memory of violence on the bodies of the victims' (Humphrey, 2000: p.7). Building upon such a belief, the law as implemented through post-conflict tribunals addresses the unspeakable evil of mass atrocities and becomes what Martti Koskeniemi has identified as the 'liberal narrative' of a show trial (Koskeniemi, 2002: p.33).

This liberal narrative signifies the legal authority to distinguish what is lawful from what is unlawful, and to separate the perpetrator from the victim. However, such liberal narratives of justice not only become a constitutive moment in which ‘moral entrepreneurs’ conduct a show trial, but also run through TRC projects (Nagy, 2008: p.277). As a result, both types of ‘show’ tribunals and truth commissions function not only as justice mechanisms, but also serve as pedagogical instruments (Osiel, 1997: p. 17). ‘Unaspiringly, law is concerned not only with the determination of guilt or innocence in traumatised societies, but also functions as an attempt to romanticise the TJRC’s pedagogic function of restoring public faith in the state (interview with ICTJ officer no. 1, Nairobi, February 26, 2012). Hence, narratives about violence are ‘morality stories that contain reference to weapons, wounds and community, thereby identifying the source of violence...’ (Humphrey, 2000: p.14)

As a result, this narrative structures the relational position between the victim’s testimony and the perpetrator’s confession within a particular social reality, and delineates these asymmetrical relations when the violence is being described. This makes testimonies and confessions both readily ‘available for political appropriation in the future’, particularly in relation to nation building (p.13). Such ‘symbolic and pedagogic functions’ appear within the broadly defined ambitions of the TJRC mandate in Kenya (see Table 5.2).

In this respect, the method of highlighting individual testimonies and confessions at public hearing sessions confirms the ‘expressivist’ roles of restorative justice in interpellating victims’ collective solidarity against mass atrocities. In examining the role of expressivism in legal proceedings in Cambodia, Maria Elander has identified four ways in which transitional

justice interpellates members of the public (2012: pp.100-1). Key among these is the way in which transitional justice functions as an educational mechanism, emphasising community values and conveying the moral message that justice is being done, ‘in order to ensure that lessons are not forgotten’ (p.101). As such, the performative function of the TJRC’s public hearings has confirmed its role ‘as a theatre of renewal, through which collectivity is reconstituted and order is restored’ (p.100). What remains problematic is the question of whether the predominant expressions of selected victims’ testimonies incorporated into the TJRC’s six volumes report meet the IDP community’s expectations of justice and reconciliation.

During the 2012 public hearing sessions, the TJRC conducted 14 thematic hearing sessions on a range of various issues (2013: Vol. I, p.115). While these were conducted with the purpose of raising awareness among members of the public about the TJRC’s task of national healing and reconciliation, the thematic sessions were described by the IDPs as ‘a waste of the taxpayer’s money’ (interview with IDP no. 81, Rift Valley, March 15, 2013).

Table 5.8: The Locations of the Public Thematic Hearings		
	Region	Hearing Locations
1	Central	Nyeri, Muranga, Kiambu and Nyandarua
2	Coast	Lamu, Hola, Kilifi, Mombasa, Kwale and Wundanyi
3	Eastern	Meru, Embu, Machakos, Makindu,, Kitui, Marsabit and Isiolo
4	Nairobi	Nairobi
5	North Eastern	Garissa, Wajir, Mandera and Moyale
6	Nyanza	Kisumu, Kisii and Kuria
7	Rift Valley	Kericho, Nakuru, Naivasha, Narok,, Kajiado, Rumuruti, Eldoret, Lodwar, Kapenguria, Kitale and Baringo
8	Western	Mt. Elgon, Kakamega, Busia and Bungoma
9	Uganda (Refugee Camps)	Kiryandongo

Source: (T.J.R.C., 2013: Vol. 1, p.102.)

Table 5.9: Schedule of the Thematic Hearings		
	Thematic Hearings	Date(s)
1	Children	December 13 & 14, 2011
2	Ethnic tensions and violence	February 2, 2012
3	Internally Displace Persons	February 3, 2012
4	Women	February 8, 2012
5	Economic marginalisation and minorities	February 13, 2012
6	Persons with Disabilities	February 16, 2012
7	Torture	February 28, & March 7, 2012
8	Prisons and detention centres	February 29, 2012
9	Access to justice	March 1 & 2, 2012
10	Political assassinations	March 5 & 6, 2012
11	Security agencies, extra-judicial Killings and massacres	March 9, 2012
12	Armed militia groups	March 12, 2012
13	1982 Attempted Coup	March 21, 2012
14	Land: Historical injustices and illegal/irregular allocation of public land	March 22, 2012

Source: (T.J.R.C., 2013: Vol. 1, p.115.)

Indeed, from the author's observations of the TJRC's proceedings between February and March 2012, it can be suggested that the public hearings generated less public excitement and support; there was a marked lack of attendance at the majority of its hearing sessions, as was evidenced by the abundance of empty chairs (fieldwork notes no. 2, Rift, Valley, March 25, 2012).

The focus on the wide range of violations that were perpetrated before the 2008 crisis suggests that the proceedings mainly attracted the victims and survivors of previous regimes, rather than IDPs who were displaced as a result of the post-election violence (interview with IDP no. 82, Rift Valley, March 15, 2013). However, public hearings that focused on the specific themes of 'IDPs', 'ethnic conflict', 'land', 'massacres' and 'political assassinations' have not failed to attract the interest of the IDP community (fieldwork note no. 3, Nairobi, April 15, 2012).

It can be suggested here that, while the realistic understanding of justice and issues pertaining to the definition of ‘violation’ may vary among Kenyans, nearly all of the individual testimonies suggest that violations occurred because of the failure of state officials to prevent them from occurring (see Table 5.10).

Table 5.10: Factors that Encouraged Perpetuation of Gross Violations of Human Rights

The Commission finds that the following factors encouraged the perpetuation of gross violations of human rights during the mandate period:

- The failure of the first government in independent Kenya (led by President Jomo Kenyatta) to dismantle the repressive state structures established by the colonial government.
- The use of and subsequent enhancement of repressive laws, policies and practices initially employed by the colonial government by the first two post-independence governments (President Jomo Kenyatta’s and President Daniel Arap Moi’s administrations).
- The creation of a *de jure* one party state by President Moi’s government, resulting in severe repression of political dissent and intimidation and control of the media. Repression of political speech and the media allowed many violations to occur with little public scrutiny, much less accountability.
- Consolidation of immense powers in the person of the President, coupled with the deliberate erosion of the independence of both the Judiciary and the Legislature.
- The failure of the state to investigate and punish gross violations of human rights. The Commission finds that in most cases, the state has covered-up or downplayed violations committed against its own citizens, especially those committed by state security agencies. During the entire mandate period (1963-2008), the state demonstrated no genuine commitment to investigate and punish atrocities and violations committed by its agents against innocent citizens.

Source: (T.J.R.C., 2013: Vol. 4, p.9.)

The testimonies also suggest that the state officials are responsible for these violations by virtue of having employed various obstructive methods associated with impunity or the pervasion of justice at various governmental levels, ranging from the civil service to the military (T.J.R.C., 2013: Vol. IV, pp.1-63). The primary focus on the testimonies of

individuals may challenge the state's official narrative concerning past authoritarian practices (see Hayner, 2011).

In this respect, the TJRC as a form of state apparatus sits very well with Nussbaum's assertion that 'public culture needs something religion-like...something passionate and idealistic if human emotions are to sustain projects aimed at lofty goals' (Nussbaum, 2013: p.14). This need of 'something passionate' refers to the administration of justice with 'political emotion' rather than the dry facts of law; the full disclosure of individual stories becomes an enunciative space to rupture impunity, and to define justice and reconciliation.

In reality, however, the predominant focus on public emotions, morals and faith-based narratives 'have large-scale consequences' for the future direction of rebuilding societies that are emerging from authoritarian rule. 'They can give the pursuit of those goals new vigor and depth, but can also derail that pursuit, introducing or reinforcing divisions, hierarchies, and forms of neglect or obtuseness' (p.3). 'We thought by attending the session it would lessen our distrust in the state, but we were wrong' (interview with IDP no. 84, Rift Valley, March 15, 2013). 'After telling my stories, I remained hunted by the past [atrocities], and naively believed that my testimony would function as a ritual cleansing' (interview with IDP no. 85, Rift Valley, March 16, 2013). 'What moral and goodness is left for me if those [leaders] preached forgiveness and peace, but denied justice?' (interview with IDP no. 86, Rift Valley, March 16, 2013).

Through these testimonies, some of the IDPs who participated as an audience acknowledged that what was perceived as the natural language of morality and the dramatic preaching of national healing, unity and reconciliation only confirmed the political intention of the ruling class to continue their practice of impunity by manipulating the TJRC's proceedings. Coincidentally, a local politician who attended one of the sessions whispered to the author that, 'the testimonial proved that we are ready to forgive and are not seeking vengeance or criminal justice. If only the ICC understood our language' (interview with local MP no. 2, Rift Valley, March 14, 2012).

Interestingly, the idea of 'forgiving and not seeking vengeance' against those in power confirms the placement of the TJRC's public hearings within an illiberal environment, 'the manner in which a text is written, a speech is uttered, a thought is thought is integral to its content. There is no neutral form of representing the world, in which the speaker or writer is embedded' (Bleiker, 2000: p.280.). As such, what appears to be a faith-based institution like the TJRC, with its visualisation of reconciliation based on 'forgiveness' and 'truth-telling', only confirms what Althusser describes as ISA:

Given the Marxist tradition's considerable work (and especially Lenin's) on how the "state apparatus" reproduces the legal and political conditions for capitalist exploitation, Althusser took the term but refocused instead on how ideological conditions were reproduced... In Althusser's view, however, a different set of apparatuses—much less well examined or understood in the Marxist tradition—played a parallel role in sustaining capitalist class structures. He named that set the Ideological State Apparatus (ISA) to ascertain parallels with the RSA despite their differences (Wolff, 2005: p.225).

In this respect, Wolf argues, what is identified as ideology by Althusser also functions through the projection of ideologies or internalised norms and values upon the subjects through ISA, such as educational and religious institutions (p.226).

Indeed, the adoption of ISA as a method of uncovering partial justice has been advanced by Claire Moon's study on TRCs in South Africa and Elander's study of the relation of victims to the Extraordinary Chamber in the Court of Cambodia (ECCC). In this context, the adoption of South Africa's TRC template by Kenya's TJRC signified the ruling class' predominant focus on the faith-based features of TJRC, in order to cultivate selective ideas or notions of partial justice, such as 'forgive and forget' (interview with IDP no. 87, Rift Valley, March 17, 2013).

Given that the primary focus of the post-election crisis is on both retributive and restorative justice, the political game of defying the ICC's proceedings was reinforced by the ruling class' appearance of co-operating with the TJRC at the national level, hijacking the victims' emotions about justice and engineering their sympathies towards partial justice (see Brown and Sriram, 2012). The situation of partial justice in Kenya confirms what other commentators have described as 'compromised justice' in Serbia and Croatia, in which the post-conflict elite focus mainly on the acknowledgment of 'past atrocities' in order to confirm their desire to enact a transition and 'move forward'. This further exaggerates the need for 'forgiveness' and a 'narrative of peace', but abandons the components of retributive justice and reparation in transitional justice (see Grodsky, 2009a). The same politician interviewed by the author also agreed that the TJRC's legal modus operandi is more suitable than the constrained style of the ICC's prosecutions (interview with local MP no. 2, Rift Valley, March 14, 2012). Their

exaggerations of the difference between justice and peace were echoed by a town councilor, ‘by virtue of the fact that we are becoming more peaceful, it is obvious that KNDR’s aim of national reconciliation is best reached through forgiveness [TJRC] rather than punishment [ICC]’ (interview with City Council officer, Nairobi, February 20, 2012).

Such political tones of peace narratives, and the misleading intentions of the TJRC’s mandate, ‘reinvigorated an old debate regarding whether peace or justice is more important’ during the 2013 election (Cheeseman et al., 2014: p.10), which served to perpetuate the IDPs’ perceptions about partial or compromised justice when peace and forgiveness were preached as the “official” language of reconciliation. ‘In other words, for all of the good work done as part of the peace narrative, it is also clear that a peace-at-all-costs message ... suppressed frank discussion of critical reform issues that historically contributed to violent elections’ (p.10). Unsurprisingly, ‘...stability was prioritized over a competitive and fair election leading to a ‘negative peace’ characterized by the cessation of hostilities, rather than a ‘positive peace’ built on trusting and harmonious inter-ethnic relations’ (p.11).

As such, some concluded that the TJRC is a measure for ‘transitional forgiveness but not transitional justice’, and allows those who ‘have blood on their hands’ to suppress the conducting of further criminal investigations (interview with IDP no. 88, Rift Valley, March 18, 2013). Throughout the author’s observations of the TJRC’s public hearing sessions in 2012, it was apparent that its concurrent operations with the ICC proceedings not only created confusion among the wider population (due to the limited amount of civic education they had received), but also created the widespread perception among the IDPs that its actual operations

were navigated by the ruling class' attempt to defy prosecution or criminal justice (fieldwork note no. 4, Rift Valley, April 7, 2013).

Hence, peace and reconciliation narratives (regardless of what these terms mean to the ruling class) were preached as an ideological call to justice, despite standing in contradiction to the IDPs' demands for retributive and restorative justice (see Robinson, 2011). ISA functions, in Althusser's view, by "interpellation" [in which the state apparatus] "call" individuals in particular ways that prescribe and enforce' a specific thinking 'about their identities, their relationship with other individuals, and their connection to social institutions' (Wolff, 2005: p.225).

It is no secret that the ruling class' preference for the TJRC over the ICC is part of their attempt to defy criminal accountability. 'I am not happy with the way the TJRC has been politicised by the politicians, but I have no other options, except attending the [TJRC] public hearing sessions (interview with IDP no. 89, Rift Valley, March 17, 2013). 'Waiting for the ICC's verdict is like waiting for a dying [form of] justice' (interview with IDP no. 90, Rift Valley, March 17, 2013). However, these IDPs have no other options, as their needs for justice and reconciliation have to be pursued through some form of legal or non-legal mechanism. In this case, some of them attempted to do so by participating in the TJRC's sessions:

I have lost hope in the ICC but I have no other options, except attending the TJRC sessions. Yet I am more frustrated with the way the politicians responded to the commission (interview with IDP no. 91, Rift Valley, March 18, 2013).

At first, I was hoping that justice would be done through the ICC. Yet after four years of waiting for justice, I decided to forgive, and forced myself to accept the fact that the best thing is to move forward, and to hope that there will be some compensation for our losses (interview with IDP no. 92, Rift Valley, March 18, 2013).

After four years of battling justice, I have decided to forgive and forget. There is no point in prosecuting those in power. Let justice take its course through forgiveness, since we don't receive compensation if we continue to prosecute those that try to help us (interview with IDP no. 93, Rift Valley, March 19, 2013).

Such testimonials reveal that many members of the IDP community recognise the near impossibility of seeing retributive justice delivered by the ICC. As such, some have expressed their preference for the realistic expectation of justice in the form of reparation or material compensation that can be delivered by the TJRC (see Table 5.11). This means that the IDPs' focus on justice has been compromised; the majority of them are now concerned solely with the TJRC's recommendations of reparations, as the ICC has abandoned its focus on retributive justice.

Table 5.11: Excerpt of the TJRC Report, Volume 4 on Reparation and Criminal Prosecution

- The Commission has made findings of responsibility against individuals where such persons had an adequate opportunity to respond to allegations in interviews, hearings or in writing. However, a significant number of adversely mentioned persons did not respond to the Commission's invitation to respond to allegations levelled against them. In the absence of a response from such AMPs, the Commission presumed the allegations as levelled against them to be truthful. This is in accordance with the jurisprudence of quasi-judicial human rights bodies. In the practice of the African Commission on Human Rights and Peoples' Rights and the Inter-American Commission on Human Rights (IACHR) the facts alleged in a complainant's petition is presumed to be true if the respondent state has not provided responsive information during the maximum period set by the respective commissions. Similarly, the Human Rights Committee has established the practice of drawing its decision on the basis of information provided by the complainant when the respondent state fails to participate in the communications procedure.
- In making findings of responsibility against individuals and groups, the Commission employed the balance of probabilities standard of proof. This standard is akin to the preponderance of evidence normally used in civil cases. It is the same standard used by similar truth commissions internationally. The Commission was not a court of law and therefore the finding it has made in reference to an adversely mentioned person is not a finding of guilt.
- It is noteworthy that some compared this Commission's work with that of the International Criminal Court (ICC) or asked about the relationship between the Commission and the ICC. As noted, the Commission was not a court of law, and while some of the purposes of the Commission were similar to that of the ICC, they were very different institutions. First, the Commission was a more victim-centered institution. The ICC, while more victim-centered than many courts, still has as the subject of its primary focus the suspect, and determining by a high standard of proof whether the suspect is guilty of the charges alleged. Second, the Commission was

focused on historical narratives, context, and perspectives of victims, perpetrators, and witnesses. The ICC, like all courts, is much more narrowly focused. As a result of these and other differences, the Commission was able to interact with, and provide participation for, far more victims and other Kenyans than the ICC. Third, the ICC's temporal mandate is relatively narrow – from the time of the ratification of the Rome Statute by Kenya on June 1, 2005 to November 26, 2009 (the date of the ICC Prosecutor's filing of a request for the initiation of an investigation into the Kenya situation). The Commission's temporal mandate is far broader, from December 12, 1963 to February 28, 2008, and in fact extends before and after that period.

- Some also asked about the role of the Commission with respect to the 2007 post-election violence. As noted earlier, it was the 2007 post-election violence that provided the immediate impetus for the creation of the Commission, and that period of Kenya's history is clearly within the temporal mandate of the Commission. Consequently the Commission heard a good deal of testimony concerning the post-election violence. The Commission, however, limited the amount of resources that it devoted to that period for three reasons. First, the period of post-election violence was a very small part of the time period in which the Commission was to examine historical injustices and gross violations of human rights. Second, a previous commission of inquiry – the Commission of Inquiry on the Post-Election Violence, also known as the Waki Commission – had focused specifically and narrowly on violations during this period. Third, through its focus on initially six, and now three, individuals, the ICC was and is investigating this period of Kenya's history. In other words, it was the view of the Commission that a good deal of time and resources had already been, and were continuing to be, focused on this period within the mandate. Without commenting on the quality of either of these separate investigative institutions, it was the considered view of the Commission that its limited time and resources would be better served focusing on those broad areas of the mandate that were not the subject of any other investigative process.
- The TJR Act also required the Commission to make recommendations concerning the reforms and other measures, whether legal, political, or administrative as may be needed to achieve the objects of the Commission.⁵ In this regard, the objects of the Commission were to promote peace, justice, national unity, healing, and reconciliation. In particular the Commission was enjoined to make recommendations regarding:
 1. Prosecution;
 2. Specific actions to be taken in furtherance of the Commission's findings;
 3. Legal and administrative measures to address specific concerns identified by the Commission;
 4. Measures to prevent the future occurrence of human rights violations.
- The Commission was authorised to make recommendations concerning any other matter with a view to promoting or achieving justice, national unity and reconciliation within the context of the Act.
- The Commission was also mandated to recommend the grant of amnesty in respect of certain offences. However, as explained in the mandate chapter of this Report, the Commission did not process any amnesty applications and as such no recommendations pertaining to amnesty have been made. The Commission was also mandated to recommend a reparation framework that would serve as the basis for repairing the harm suffered by victims and survivors of gross violations of human rights and historical injustices. Chapter Three of this Volume sets out the Commission's recommendations in relation to reparations. Finally, the Commission was required to make recommendations on the mechanism and framework for the

implementation of its recommendations. Chapter Two of this Volume makes recommendations relating to such a mechanism.

- In essence, the legal framework provided by the TJR Act facilitated the making of comprehensive recommendations on a range of topics. As such, and to facilitate implementation and monitoring, the Commission has tried to make recommendations which are specific, feasible and which have measurable short, medium or long-term goals. Recommendations which strike a resonance with the Kenyan people are likely to be the subject of mobilization and lobbying. Such recommendations are more likely to be implemented by the Government. Each recommendation has been directed to a specific entity or office holder.
- The recommendations made by the Commission are a synthesis of views expressed to the Commission and the Commission's own reflection on the findings reached with respect to various violations and issues. The recommendations reflect views expressed to the commission by victims, witnesses, civil society organisations, experts and government officials who interacted with the Commission. With respect to victims, the Commission solicited their views on recommendations through the statement taking process. Additional recommendations were proposed to the Commission by those who testified during the individual, thematic and institutional hearings held around the country.

Source: (T.J.R.C., 2013: Vol. 4, pp.2-4.)

While the TJRC's mandates prompted the commission to recommend further criminal investigations of past atrocities (TJRC, 2013: Vol. IV, p.72), the elite's ongoing attempts to defy the ICC suggest that any future criminal investigation recommended by the TJRC is unlikely to be undertaken by the new government.

This leaves the reparation part of the recommendations. When the IDPs described their adoption of a 'forgive and forget' mentality, they specified that the adoption of this mentality was not borne out of their agreement with the ruling class' narratives of justice and reconciliation, but out of the realisation that they were far more likely to receive reparation and financial compensation from the TJRC than they were from the ICC. There are two main types of reparation suggested by the TJRC's report: individual reparations and group reparations (TJRC, 2013: Vol. IV, pp.97-122).

However, even after these reparations were chartered in the TJRC's report, the reparations have still not been awarded more than six months after the release date of the report. This explains why some of the above testimonials reveal the belief that 'justice takes its course through forgiveness' which suggests the belief in partial justice. Furthermore, given the realistic expectation of the IDPs who participated in the public hearing sessions to receive reparation, especially in the form of land resettlement, psychological support and remembrance in the form of public monuments (TJRC, 2013: Vol. IV, pp.100-27), it is obvious that the lack of government attention to their reparation needs has encouraged some IDPs to reject the TJRC's report (fieldwork note no. 4, Rift Valley, April 7, 2013). These IDPs believe that the TJRC report has betrayed their trust, and now expect to receive immediate financial rewards from the electoral candidates during the election campaign. This belief was echoed by Olivia:

the [TJRC] report described our responsibility to the government very well, but some of us fear that if we show our inclinations towards meeting the ICC and TJRC's wider demands, we might not receive our reparation demands. The best thing is to "respect" those politicians (interview with IDP no. 94, Rift Valley, March 19, 2013).

Olivia later confirmed that she had been informed by the local MP for whom she voted in the 2013 election that he would quickly process her demand for funding to buy land. In this respect, the TJRC (and the ruling class' preference for its restorative justice over the retributive justice of the ICC) has interpellated or 'called' Olivia to subordinate and alter her needs for criminal justice. She has been 'psychologically forced' to expect restorative justice by accepting her position as a victim, and that she is a political subject of the ruling class. When other IDPs described their 'forgive and forget' mentality, Olivia recognised that she was

being presented with a more realistic chance of being “normalised” into society by supporting the existing patronage networks, rather than by expressing her support for the ICC’s crusade to administer criminal justice. While it remains to be seen whether the TJRC will provide reparations for other IDPs, Olivia has decided to cease her pursuit of criminal justice and to no longer consider the retributive desires of other IDPs, despite the fact that she lost her entire family owing to the negligence of local policemen during the 2008 crisis. Olivia’s testimonials were recorded in 2012 and 2013, before the TJRC concluded its final reports.

However, the official release of the final reports of the TJRC has transformed it into a pedagogical apparatus that “formalises” the ruling class’ ideological preference for restorative justice as a means of continuing their practice of impunity. Olivia was ‘officially’ interpellated when she declared her support for President Kenyatta during the 2013 elections. As a result, she received her financial compensation, which she used to buy land a few weeks after Kenyatta won the March 2013 elections. Other IDPs who participated in the TJRC’s sessions and who followed a similar path to that of Olivia received instant financial rewards during the election campaigns of Kenyatta and his ally, William Ruto (interview with IDP no. 95, Rift Valley, March 19, 2013).

In this respect, TJRC as ISA does more than simply create new socio-economic positions for the displaced victims as permanent subjects of vulnerability; it also creates disenfranchised and dependent citizens, particularly when the TJRC’s primary focus on the performative dimension of victimhood, violation and a sense of loss ignores their position as subjects of political manipulation. ‘I remain a victim and nothing can be done to undo it’ (interview with

IDP no. 96, Rift Valley, March 23, 2013). ‘I always thought that I could challenge those politicians when the TJRC suggested criminal investigations, yet I am “relieved” to know that no matter what path I take [in seeking justice], I remain displaced, haunted, and forced to be “grateful” if I am compensated’ (interview with IDP no. 97, Rift Valley, March 20, 2013).

F – Conclusion

This chapter has attempted to identify the ideological structures that cause IDPs to want instant material rewards that are not related to their needs for retributive and restorative justice. It has also attempted to define the ideology of reconciliation and national unity that has successfully convinced them that the TJRC advances their needs for retribution, restoration and reparation, while showing that in reality it does quite the opposite. As such, this confirms the studies on TRC in South Africa by Humphrey (2000) and Moon (2008), which assert that attempts to unearth past injustices do not necessarily correspond to the victim’s perspective, but are contingent to societal structure and the ruling class.

Secondly, viewing TJRC as ISA reveals the irony of the TJRC being used as a mechanism for delivering justice and reconciliation, which undermines the supposedly ‘natural’ and ‘uncontested’ ideology of justice through its focus on reparation. Indeed, the TJRC has actually performed an oppressive function, since the final report has not acted on its recommendations, and has been ‘replaced’ by the IDPS’ expectation of immediate patronage rewards during and after the 2013 election, and before and after the release of the TJRC report. Hence, money has been awarded to IDPs based on their readiness to persuasively defy the ICC and TJRC’s proceedings. Such an ideological pursuit of partial justice has reinforced the IDP’s belief in ‘business as usual’. The ruling class has successfully utilised the TJRC to

promote partial justice and reconciliation, as well as to defy criminal accountability. The anomaly of adopting TJRC in the highly contested nature of regime change in Kenya not only confirms Quinn's (2009c) study of the failure of TRCs in Haiti, but reveals the shortcomings of transitional justice literature in explaining and assessing the increasing adoptions of transitional justice mechanisms within an unclear paradigm shift.

Thirdly, it is crucial to recognise the hard work of the TJRC staff members in documenting past atrocities. However, the reality is that the TJRC is far from allocating any of the reconciliation dividends that were envisioned by the KNDR agenda, especially agenda items three and four. Similar to Hayner's (2011) findings, the dangers of expecting TJRC to address 'everything' have revealed its limitations. Interestingly, Kenyan policymakers and CSOs decided to add the word 'justice' to the title of their truth commission, making it TJRC instead of TRC as a reminder of the country's infamous record of impunity. Yet the TJRC's primary focus on dramatising human emotions may increase public expectations of its performance in the short term, but its legacy is likely to vanish from public memory when no concrete outcomes are produced in the long term. Simultaneously, the TJRC has revealed the attempt of the post-conflict elite to romanticise their needs in order to socially heal the legacy left by the post-election violence, and has revealed the highly unlikely probability of the government remaining committed to meeting broader reparative demands that have arisen from 45 years of state-related violations of human rights.

Finally, the TJRC reports rely heavily on the victims' testimonials, but many IDPs do not find its revelations to be cathartic. For these individuals, the TJRC's benevolent task of pressuring

the government to comply with its findings has confirmed the broader concerns of scholars of post-conflict studies about the danger of establishing a binary dichotomy between victim and perpetrator. The TJRC report cannot be utilised as a basis for altering collective perceptions about victims and violations when the IDPs were “forced” to accept that justice is limited to ‘forgiving and forgetting’ (see Clark, 2012a; Sandberg, 2013; Tenove, 2013; Wallis, 2013).

The attempts to simplify victimhood do not address the complex issues of justice and reconciliation. The lessons to be learned from Kenya challenge Miller (2008), Nagy (2012) and Winter’s (2013) radical proposals of ‘unified theory’ about the ‘usefulness’ of TRC. What was perceived as the usefulness of TRC, or sustaining transitional justice mechanisms in highly authoritarian environments, can be articulated within the recent development of transitional justice scholarship and practice, in that its interaction with peacebuilding focuses on structural violence, greater democratic reforms, economic disparity and uneven development

However, such a radical proposal for broadening the scope of transitional justice (including by addressing land tenure reform as part of the IDPs’ reparation scheme in Kenya) ignores the victim’s relational positions and their patronage ties to the ruling class. Instead of providing a constitutive moment for the IDPs to come to terms with their past, the cathartic revelation of state impunity has reinforced their subaltern positions and their status as subjects of political manipulation. The findings of this chapter illuminate the deficiencies of the ‘unified theory’ regarding the usefulness of TRC in addressing non-transitional justice issues, and serve as a clear indication of the future direction of transitional justice literature in addressing the

complexity of exploring transitional justice mechanisms in unclear political transitions, and the placement of such mechanisms in neo-patrimonial modes of state and societal relations.

Chapter 6: Concluding Remarks

'You think that just because it's already happened, the past is finished and unchangeable? Oh no, the past is cloaked in multicolored taffeta and every time we look at it we see a different hue.' (Kundera, 2000: p.15).

To bring the analysis of justice- and reconciliation-seeking policy in Kenya to a comprehensive conclusion is challenging. The aim of this final chapter is to bring together the central ideas around which this thesis has been constructed.

A – Researching Transitional Justice in Kenya

Much of this section will be dedicated to identifying the lessons that can be learned from Kenya, and to suggesting future research directions for the field of transitional Justice itself. Despite the complexity of the numerous legal and political initiatives activated by the Kenyan National Dialogue and Reconciliation (KNDR) policy (including the implementation of the new constitution, devolution and electoral reforms) this analysis conducted in this thesis has focused primarily on the two major transitional justice mechanisms active in Kenya, namely the International Criminal Court (ICC) and the national Truth, Justice and Reconciliation Commission (TJRC). Connecting both mechanisms to the larger themes of democratisation, justice and peacebuilding efforts in Kenya provides two instructive lessons, which will be discussed in turn.

I) Transitional Justice in the Absence of Political Transition

The most challenging task is to position the Kenyan case into a broader transitional justice literature, in particular when transitional justice mechanisms have been applied or considered within the context of unclear or illiberal political transition. In this respect, I have largely agreed with a pragmatic yet controversial position by one of the most actively engaged transitional justice scholars in debating the situations in Kenya, Thomas Obel Hansen. Drawing from his previous publications on the legal analysis of the ICC's proceedings in Kenya (2010a; 2010b; 2011a; 2011b; 2011d; 2012b; 2012a; 2013a; 2013b), Hansen recently contributed to a new perspective in theorising transitional justice (2014). In that latest work, Hansen argues on how the application of transitional justice within unclear regime change with less direct concerns to the legalistic debate within the field itself signifies what he coined as 'normalising' transitional justice in which the field is no longer associated with extraordinary features of war crimes as understood through the legacy of Nuremberg and other international tribunals (p.105).

As such, transitional justice have been politically connected to the pursue of accountability, national unity or nation building project, and the systematic violations of human rights, especially when the accused of the individually criminal suspects remained in the positions of influencing the dynamic of transitional justice in their society. Yet Hansen warned that while these new features contributed to the popular depiction that transitional justice now are more normalised and feeds very well with the critical call to expands transitional justice discreet features into broader domains of peacebuilding, development and democratisation, we need to

carefully assess whether such relations are nexus or nemesis (pp.105-106). The consequence is very obvious here when such expansive mandate or broader conceptualisation of transitional justice has become increasingly difficult to operate with one common framework of understanding and evaluating its tools or institutions.

For that, Hansen suggested that in order to rescue such contested and delicate fields, instead of expanding transitional justice case studies, including Kenya into one single framework of universal evaluation, different paradigms or standard settings needs to be created where all cases can be divided into three major paradigms (p.140). Firstly, transitional justice case studies in a clear political or liberal transition like many situations of Latin America and Eastern Europe. Secondly, transitional justice situations with a clear but illiberal regime change like the current situation in Rwanda and finally, transitional justice with the absence of transition of what likely occurred in Kenya.

Understanding different paradigm of measurements not only rescued the field of transitional justice from extreme criticisms, but also allows each case study within these three different paradigms to suggest a new avenue of research that contributes to the case study, as well as a new perspective on transitional justice research. In line with Hansen's suggestions, while the evaluation of transitional justice institutions undertaken by this thesis have not invalidate the legitimacy of the field, it urges the policymakers to give a special attention on the particularity of the case study or local experience.

This thesis has demonstrated that Kenya's attempts to deal with post-election violence emerged out of a confluence of international and national dynamics that contributed to the substantive difficulty of defining transitional justice policy. While violence reversed the progress that the country had made in democratisation since the 1990s, it is generally accepted that the crisis was predictable yet unpreventable. However, Kenya's attempts to deal with post-election violence and the recurring pattern of impunity has provided local opportunities for invoking the use of legal measures that have been acknowledged in transitional justice literature, and adopted by various countries that faced more substantive regime changes.

However, in a hybrid case such as Kenya's, which is neither fully democratic nor deeply authoritarian, achieving liberal peace by means of power-sharing leaves a limited amount of space for transitional justice to operate in. The practical danger that arises is whether or not the ambiguity that is produced by the power-sharing deal has reinforced the Kenyan victims' perception that the process of formulating transitional justice has become entangled with the elite's struggle to retain impunity and defy accountability (interview with IDP no. 96, Rift Valley, March 20, 2013).

In short, the deficiencies of existing transitional justice literatures concerning the debate of universal framework of evaluation of the success story have not grasped the fact that, while the installment of a power-sharing government prevents a clear regime change (Hansen, 2013b: p.320), the language of transitional justice has been widely connected to the continued effort to advance democratisation and reforms in Kenya (Chapter 3). In reality, many African

countries that share similar features to those of Kenya have undergone many transitions; from colonial to immediate post-colonial government, and from single to multiparty systems.

However, the pursuit of justice (including the addressing of social inequalities and the structural violence that caused the democratic crisis) has not been successful in Africa. This is likely to trigger a precarious and turbulent judicial transition, or a pursuit of ‘justice’ without the substantive element of transition, as has occurred in Kenya. The current situations in Zimbabwe, Libya and the Ivory Coast confirm are prime examples of such case studies.

For over two decades, research on building a robust system for establishing accountability in Kenya has been connected to efforts to advance the process of democratisation, thereby allowing political scientists to deploy multidisciplinary forms of analysis in an effort to understand the logic of the politics of accountability in Kenya through the language of transitional justice, creating a symbiotic relationship between transitional justice and peacebuilding (Hansen, 2011c: p.34). As such, the simultaneous efforts of criminal prosecution and truth commissions were connected from one election period (2008) to another (2013), allowing an extensive analysis of specific transitional justice mechanisms and its interaction with national political dynamics, as well as its connection to plausible future trends in resolving political crises in Africa through modes of liberal peace, and the understanding of transitional justice and power sharing.

If the situation in Kenya demonstrates the fact that continued efforts to consolidate democracy in Africa have provided a language for transitional justice policy, the only component that is

missing is that of Disarmament, Demobilisation and Reintegration (DDR) (see also Sriram et al., 2013). As such, future research under the similar predicaments in Kenya needs to investigate on what common frameworks of evaluation can be utilised to identify:

- under what likely and unlikely factors that allows transitional justice ideas is to be used as part of the democratic reforms instruments?
- how does the local agencies correspond to these processes, in particular the complexity or the excessive politicking or brinkmanship games among the national elites?
- how do we measures various perspectives, instead of one single narratives of ‘local’, and, do we need more flexible and mixed methods?

As I leave these questions for future research, I would also like to remind the reader on how my experiences of meeting various stakeholders in Kenya have shaped some of my understandings on political liberalism and international justice, which will be discussed next.

II) Transitional Justice and Political Liberalism Tautology

Throughout my observation on how the ideas of transitional justice have been conceived within the secondary literature as well as from the empirical evidence of Kenya, I realised that that the actual condition for theory of transitional justice is lies in its ability to provide comprehensive package of justice, including retribution, restoration and redistribution to restore or reconcile the shattered living conditions of the victims back into the society, as well as their faiths towards the state ability to safeguard their security and rights.

Within the Western liberal theoretical traditions, there are rich discussions¹⁰⁷ on how such ideas of political rights, civil liberties and social justice is underpinned by a robust social contract, with particular citations from John Rawls' *Theory of Justice* (1971). What remained to be seen is a scant theoretical discussion within the literatures of liberal peacebuilding and transitional justice on how the liberal pursuits and commitments of building liberal democratic values in post-conflict societies are intentionally expressed through the international commitments in preaching Rawlsian conception of justice when building democracy in dangerous place. While John Rawls remained contested within the great traditions of liberal political tautology, especially with a latest publication of his former student, Amartya Sen's *The Idea of Justice* (2009), there is a wider discussion within the transitional justice literature on how its institutions impacted on greater democratisation and liberal environments, as envisioned by Rawls (Andrieu, 2014: 85-104). Therefore it is essential for this section to revealed what lessons of justice that can be learned from Kenya.

In this regards, during the negotiation of the power sharing government that lead to the transitional justice institutions, the Deputy Prime Minister of Kenya, Musalia Mudavadi cited Paul Collier's *War, Guns and Votes: Democracy in Dangerous Places* (2010). In Musalia opening speech (2010), he urged the international community to use the situation of mediating crisis in Kenya in order to reflect their commitments to international security and peace through intervention. Interestingly, Musalia highlights Collier's arguments how Sub-Saharan Africas are neither nations nor states, due to the amalgam of various competing ethnic identities and the only public goods available are bad governance served with ethno-centered

¹⁰⁷ For a useful discussion on debating Rawlsian notions of justice in post-conflict environments, see (Friedman, 1998)

politics. Build from this particular Collier arguments, he eventually agreed on how the political elites in Kenya have not internalised democratic and accountability values resulting violence based of democratic competitions within the already weak institutions. Whether Collier or Musalia is right or wrong in sensationalising Kenya's 2008 crisis, if we would like to apply the thrust of both Collier's and Musalia's cynicism to the crisis, there is a greater needs introspection on whether liberal intervention in such 'dangerous places' through transitional justice institutions and liberal peacebuilding domains have successfully cultivates political liberalism as envisioned by Rawls. As a result, I have discovered three features of transitional justice negated the liberal political imaginations as envisioned by Rawls as follows:

i) Retributive Justice and the Irony of Liberalism, Morality and Law

To justify the condemnation of human rights violators and war criminals, there is a normative perception that tribunals have curative powers; they educates the public about the past, they promotes the shared truths and upholds the universal values of laws and sanctions the moral norms. Similar to the legacy of the Nuremberg, ICTY (former Yugoslavia) and ICTR (Rwanda), the ICC's proceedings in Kenya were also used for larger more ambitious purposes, yet remained ironies from the great moral values of liberalism with its form of legalism that emphasise the separation between law and politics (Chapter 4). The latest failure in prosecuting Uhuru Kenyatta revealed the contradictory and difficulty to accomplish and almost impossible of such retributive tasks (Mungai and Kiranda, 2014).

In response to the Kenyan situation, I believe that there is a reasonable ground to largely agree

with Jenifer Balint (1996) claims that the international lawyers have failed to develop a systematic explanation, using what she terms ‘international criminology’. Perhaps this is because previous legal literature had simply assumed that, once the indictments had been made and trials were underway, the atrocities and the instances of impunity would be erased and justice would prevail. Between 2012 and 2013, there is widespread fear among the victims and the prosecutor’s witnesses under the protection of the ICC that the bringing to justice of the ICC’s suspects will turn the IDPs and witnesses into ‘traitors’, since their actions will have been deemed to undermine collective moral values by placing the burden of the crime upon a particular ethnic community in Kenya (interview with IDP no. 99, Rift Valley, March 21, 2013).

While the ICC may attempt to highlight the criminal responsibility of the individual, the ruling class and the ICC’s suspects have ensured that justice is administered on the basis of collective guilt. For instance, prosecuting Kenyatta and Ruto has been erroneously understood as punishing the Kikuyu and the Kalenjin communities respectively. As such, when the GNU proudly claimed that KNDR policy was being successfully implemented by the TJRC, it was not speaking on behalf of the political community it was supposed to represent. This created a fictional narrative of justice that did not represent all of Kenyan society (interview with IDP no. 98, Rift Valley, March 21, 2013).

In such instances, the lessons from Kenya reminds us on how retributive justice is thus considered a means towards an end, and trials, containing as they do an expressive and educative function are used for the sake of democratic transition and subject to political

brinkmanship games. Of course, this idea is certainly not new. The French sociologist Emile Durkheim saw justice and punishment as an essential means of reactivating national unity by offering society the occasion to gather in common rejection of crimes (Gane, 2005: p.235). Meanwhile Bruce Ackerman calls trials affirmed 'constitutional moments' for moral judgments (Ackerman, 1991: p.84), and Hannah Arendt was aware that such a show trial is a political drama when she internally debated whether or not she assisted in Adolf Eichmann's trial in Jerusalem after realising the ultra motive of Israeli Prime minister of Ben Gourion's intentions to unify Israeli society (Arendt, 1977: p.15). In this regards, I would like to highlight not only how retributive elements of transitional justice can be instrumentalised by the most powerful actors to moralise law, but also how attempts to police society is negating the Rawlsian notion of the individual liberty. In order to avoid collective guilt that hunted the entire society, the focused on dramatising the individual crimes, the pure neutral conception of law as unimpeded by moral or biased judgments subjected itself to various political predilections and have been compromised.

ii) Restorative Justice and the Irony in Narrating Forgiveness, Peace and Reconciliation

As transitional justice evolved, so did its critics that realised the limited focus on trials is insufficient within the context of mass violence and huge number of the victims, and to compliment the existing retributive nature of transitional justice, social legal mechanism of truth commissions was developed (Arthur, 2009: p.362). Yet while the Kenyan TJRC do not abandoned future criminal investigations, its mainly focused on restorative justice, it creates large impunity gaps when some of the retributive and restorative recommendations have not been fully implemented (Chapter 5). The aimed of restorative justice is initially based on the

idea of greater democratic participations of the war torn society in delivering justice and social control in punishment that focused on healing and restoring the broken relationship (Daly and Sarkin, 2007: p.27). Yet it relied on participatory understanding of truth, justice and forgiveness with less power of criminal sanctions. The TJRC reports recognised this shortcoming when some of the identified big names and accused for committing systematic violation of human rights from the President Moi's and Kenyatta's regimes have decided not to respond or to reply back to the victim's allegations (see T.J.R.C., 2013: Vol. 4). In some cases, the victims were persuasively asked to renounce their rights to criminal justice for the sake of national reconciliation (interview with IDP no. 83, Rift Valley, March 15, 2013).

As such the restorative justice underpinned by the TJRC revealed the problematic ideas of individual rights to access criminal justice have been compromised when the individuals are perceived as subordinated to the society, which is obviously contradicted to the liberalism. Nevertheless the highly performantive nature of the TJRC operations stand in opposition of the strictly procedural and criminal justice that envisioned by political liberalism in respecting individual rights to justice and upholding the rules of law (Andrieu, 2014: p.90). Forgiveness is deeply an interpersonal exercise that cannot be dictated by the state-sponsored institutions. As such the seemingly benign, TJRC's concerted efforts to remedy vengeance with forgiveness has render the victim legal rights and his/her moral power, in particular when such institutions are conditioned by power relations.

iii) Redistributive Justice, Socioeconomic Agendas and Land Restitutions

From the situation in Kenya, I have demonstrated on how reparations have now become a prominent aspects of transitional justice codified in the final TJRC report. Accordingly, reparations defined as ‘those policies and initiatives that attempts to restore to victims their sense of dignity and moral worth and eliminate the social disparagement and economic marginalization that accompanied their targeting, with goal of returning their status as citizens’ (Verdeja, 2008: p.1). As such, various types of reparations, including financial compensation and money to buy lands as for the case of the IDP resettlement schemes understood here as a form of monetary equivalence for compensation and to restore the balance or normalising them back in the society.

However, the discussions of the Chapter 5 have also revealed that some of the IDPs have not received their reparation claims yet, and some opted for immediate financial rewards through patronage networks during the 2013 election, rather than waiting for the compensation money that have not arrive yet. If this is vaguely ‘defined’ as reparations, then the situations of the Kenyan TJRC have demonstrates its fundamental flaws, which replicates the Morocco’s Truth Commission. In this respect, while reparation was given to victims of repression, but perpetrators remained free and not subjected to fair trial or criminal prosecution (see Hayner, 2011). As such, reparative justice that attempts to reconfigure or to redistribute social inequality and economic disparity without any attempts to reforms institutions or punish perpetrator could be viewed as a form of ‘payment’ or worse, as hush money.

From a liberal perspective, such reparations are problematic. For example, the instant material awards based on patronage relation rather than a just financial compensation as chattered by the TJRC imply that individuals are tied to the actions of their political predecessors and they are part of the systematic burden or responsibility for the unspeakable crimes that committed by the state actors. While economic factors in political violence constituted the bedrock of Galtung's understanding of positive peace and the enduring of the social inequalities found in many war-torn societies, financial payments are limited to the state and non-state resources and therefore, insufficient to restore the balance of relationship in post-conflict society (Hayner, 2013). Additionally, the TJRC like many other truth commissions have opted for collective reparations, resulting a redefinition of victims to include not only individuals who experienced direct physical violence, but also those whose lives were mutilated in the day-to-day web regulations in which the atrocity took place (A. and Thompson, 2001: p.15). Such redefinition have indicate a radical breaks from strictly liberal paradigms on the preeminence of political rights and civil liberties into an immediate priority of economic and social cultural rights (Krog, 1998: p.8). There is a clear danger of prioritising the later into the actual positive rights might dangerously extend the power of the state. Liberal political traditions have long separate the administration of justice from cultural considerations or the 'politics of difference' (Young, 1990: p.36). The consequence of this is obvious when we imply a claim to certain rights and reparations triggers the construction of existentialist ideas of justice instead of the supposed voluntarily formation of the individual rights (Shklar, 1963: p.12). In this regards, a collective ideas of victim identifications based on certain narratives of time and space as witnessed among the self-help and integrated IDPs nurtured existentialist pursuits of justice and altered the existing social relations, 'becoming indigenous in pursuit of justice'. It

challenge our conventional understanding of on the victim rights to justice not based on continued primordial ideas that inherited from the ancient past, but an invented tradition that easily corrupted or manipulated by the political agency to trigger new wave of violence.

As such, while how good is the intention of the transitional justice institutions in Kenya to address broader scope of historical injustices including land displacements, it has replicated the existing deficiencies in the way the international society engaged Africa. Through, the complex task of resolving the political crisis confirms the increasing necessity of an interesting interaction between transitional justice and liberal peacebuilding; the interaction between both fields has generated more of an international engagement with Africa's heterogeneous societies in the long-term, but in the short-term it has duplicated the existing deficiencies of the technocratic and institutional focus on good governance, democratic reforms, human rights struggles and judicial administration. As such, this thesis agrees with Leslie Vinjamuri's criticism of the proponents of the justice cascade¹⁰⁸ in international politics (2012). In her critical reflection on Kathryn Sikkink's famous thesis concerning the justice cascade (2001), she described the moribund nature of justice processes in Kenya and Libya, characterising them as a 'justice casket' rather than a justice cascade. This provides a clear

¹⁰⁸ Many 'realists' of course, both academic and otherwise, continue to believe that talk of human rights and international law is merely a plaything of the powerful interests. *The Justice Cascade* confronts such readers with powerful argument to the contrary. In the early 1970s, it points out, neither authoritarian leaders in Latin America nor their most determined domestic opponents ever even contemplated the possibility that state officials, including heads of state, might one day be tried for crimes committed in office (pp.2-3). Yet thirty years later such trials have become a commonplace, even integral feature of the global political landscape (ch.4). The International Criminal Court (ICC), for example, was created to do this (amongst other things), despite determined opposition to it at one stage from every permanent member of the UN Security Council (p.199). Please see (Sikkink, 2011).

indication of the dilemma of striking a balance between moral utopia and realpolitik in human rights agendas.

Nevertheless, the ironies between the current patterns of transitional justice interactions with the Kenyan IDPs have clearly shown that while most transitional justice commentators have long dured of arguing their cases of how transitional justice promotes greater democratisation and liberal values, my observation on the administration of its mechanism in Kenya have illuminated its clear contradicted with procedural understanding of teleological liberalism since the publication of Rawlsian justice, and not every transitional justice experiments triggers a robust liberal values since the means used by the transitional justice ideas and policy have undermined the fundamental traditions of political liberalism, producing an illiberal democratic path to many hybrid situations like Kenya (Yordan, 2009: pp.87-88). Transitional justice relied heavily on a thick conception that bind the state-society relations with heavy cost of constructing the device of moral and religion for national unity, producing unintended consequences of endorsing a social holism, a sentimentalisation of public sphere, a communitarian complexion and in keeping with Aristotelian perfections that negates the liberal preference of individual political rights and civil liberties (Sandel, 1998: p.12). For that, lessons from Kenya should warned the danger of to naively argued for the causal relations between transitional justice and liberal democratic values. This brings my next appraisal to the political rhetoric in transitional justice debates.

B - Political Rhetoric: Peace, Justice and Reconciliation: How Do we know?

Regardless of whether the country is actually in the midst of a 'transition', the practical challenge lies in mitigating the increasing hostility between those who called for recognition

between those who argue that transitional justice helps to establish accountability (Alai and Mue, 2010), and those who argue that it impedes the task of establishing national reconciliation (Paisley, 2012).

However, by looking at a broader challenge within transitional justice literature itself, Kenyan situation is not novel. One of the major dilemmas in the field of transitional is that of how to strike a balance between the need to prosecute perpetrators and to promote negative peace. This has reinvigorated the old debate between the ‘logic of appropriateness’, based on liberal cosmopolitan and constructivist convictions that justice should precede negative peace (Orentlicher, 1991; Sikkink and Walling, 2007; Finnemore and Sikkink, 1998), and the ‘logic of consequence’. The latter argues that, in the sequence of peace, justice should only be executed when it has been proven that it can realistically be achieved (Snyder and Vinjamuri, 2004; Mendeloff, 2004; Graubart, 2010).

However, the Kenyan case has demonstrated that the complex pursuit of justice and reconciliation entails more than simply delineating the asymmetrical relation between peace and justice. In reality, the administration of justice (either by the ICC or the TJRC) is not willfully opposed to satisfying the IDPs’ needs or meeting the broader reconciliation goals of the KNDR policy, and this is wisely illustrated in Kofi Anan words that,

‘when you are riding in a train, and the train gets derailed, you are well advised to look backwards at the twisted rails to find out how you got to where you are, and then look ahead to find out how you now get to where you want to go. For Kenyans today, it is a question of doing just that: looking at the past to determine when and where the country got derailed. Once that is determined, you must fix and adjust the rails towards the direction of peace, justice and prosperity’ (cited in Asaala and Dicker, 2013a: p.325.)

As such, throughout this thesis, I have continuously argued on how various agencies among the ruling class invokes the fictional clashed between peace and justice as a pretext to various political vendettas in its attempt to divert the judicial focus away from criminal accountability, restoration, restitution and reparation, which eventually hinders the overall performance of the ICC and TJRC in Kenya.

Many conflict resolutionist scholars have noted, an important process in building peace after civil conflict is enhancing communication between various conflicting parties (Adegoju, 2009; Blake, 1998). The rhetorical language (or the kind of argumentation employed) used has a significant impact in revealing whether politics are fraught with conflict or accommodation.

For that, a political psychological analysis of the language of peace, justice or reconciliation can provide important insights into the reasoning and characteristics of the speakers (Ishiyama and Backstrom, 2011: p.368). In such instances, while in the second part of the chapter 2 I have clarified the key vocabularies of ‘justice’, ‘peace’ and ‘reconciliation’, I have eventually illuminated how the debate on various transitional justice options among the Kenyan MPs (Chapter 3) and the vocabulary expressions of the aforementioned terms by the ICC’s suspects (Chapter 4) shows the level of conceptual complexity or ‘rhetorical decompressions’, in which the speakers are willing to use language that is less stark and confrontational and they recognises areas of compromise and shades of gray when engaging their political opponents (interview with IDP no. 71, Rift Valley, March 12, 2013). Such rhetorical languages are excessively evidence when these politicians engaged with Kenyan publics and international

actors who widely used the same vocabularies in more general understating that I have clarified in the Chapter 2.

In short, such rhetorical decompressions itself is firstly sufficient in order to distinguish between a ‘superficial reconciliation’ and a genuine one when we considers their languages with their political actions in defying justice-seeking mechanisms. And finally, highlight the challenge of an effective communication in crisis mediation that triggers wider misperceptions of the terms in the public circle and establishes the baseline predispositions over time whether this rhetoric evolved and whether it really led to reconciliation process similar to more relatively to those found in places like South Africa and Argentina.

C – Power and Ideology in Transitional Justice: Justice without Punishment?

Throughout my observation in Kenya, I have discovered that there has been little discussion about power and ideology in the legal literature that examines to what extent the pursuit of transitional justice is capable of achieving reconciliation for victims without actual punishing the perpetrators. Can there be justice without there being a perpetrator or any form of punishment? If Foucault emphasised the difference in the functions of punishment during the period of the absolute monarch and after the introduction of the prison system, then Kenya’s judicial processes demonstrate the former functions rather than the latter, since the pursuit of justice is simply endorsed by the ruling class in order to publicly exercise their power but not to reconcile the victims with the perpetrators (1977). In this regards, I have shown that after 6 year of the operations of the ICC and TJRC in Kenya, indicated two interesting features on reading transitional justice as power and ideology.

I) Debating Accountability and Impunity in the Constellation of power Relations and Ideological Apparatus

Attempts to mitigate the complexity of the political crisis in Kenya through the adoption of a one-size-fits-all model of conflict resolution may help to accelerate the process of flawed democratisation in the long term; for the time being, however it only empowers the ruling class and heightens IDPs' collective sense of being excluded from judicial processes (interview with IDP no. 63, Rift Valley, March 10, 2013). The transitional justice mechanisms were mediated or came into force through the relational positions between the ICC's suspects and the IDPs, particularly as a result of the patronage relations between the ruling class and various subaltern agents.

In this aspect, viewing transitional justice as power allows us to understand how judicial processes emanated from discursive forms of accountability, yet the ruling class' ability to replace these with discursive forms of impunity illuminate the relational position between the ruling class and the IDPs. Furthermore, contextualising such power relations within specific ideological apparatus (ICC and TJRC) helps to unravel the rhetorical agenda of partial justice, in which IDPs were forced to accept that their demands for justice were most likely to be met through the pursuit of restorative rather than retributive justice. However, the failure to provide the IDPs with reparation and restitution confirms that the actual inception of the TJRC was carried out with the aim of replacing the precondition for retributive justice specified in the ICC's ongoing proceedings.

II) Transitional Justice as Politics: The Fascinating Intricacy between Law and Politics

While the epistemic understanding of the liberal cosmopolitan approach to human rights and humanitarian projects in post-Cold War Kenya has confirmed the shared affinities of transitional justice and peacebuilding with rescuing the victims from conflict zones; the pursuit of transitional justice through liberal peacebuilding practices reveals the complexity of restoring order, and that the rule of law is heavily conditioned by politics. Navigating law and politics in both fields confirms Hazel Cameron's identification of the 'fascinating intricacy' of the interaction between institutions of international law and international politics. In her study, *Britain's Hidden Roles in the Rwandan Genocide* (2012: p.71), she demonstrates that an understanding of politics as the act of manipulation by the international elite is not immediately obvious to the casual observer. Such a tacit understanding of power and politics results in the creation of circumstances in which the western countries' ability to perform the immediate tasks of upholding human rights and preventing genocide is highly influenced by their geostrategic and economic interests in Africa.

For that, in Kenya, the moribund state of the ICC's judicial administration, and the inconsistent stances of the western partners in relation to its proceedings, reveal the 'fascinating intricacy' between law and politics (Brown and Raddatz, 2014). Equally important is the fact that, while the ICC's quest to deliver justice is largely conditioned by external politics, the ruling class played a significant role in obstructing the justice cascade (interview with IDP no. 15, Rift Valley, February 12, 2012). Retrospectively, the situations that arose from the ICC's indictments against its suspects and the TJRC's primary aim of

national healing have reinvigorated an all-too-familiar debate about the misleading trade-off between accountability and impunity, or between justice and peace (Chapter 3).

By adopting Ranciere's assertion that politics begins when victims who cannot usually do anything to assert their rights through mass mobilisation and the inciting of civil strife. In these circumstances, it is not difficult to imagine the depoliticisation of the KNDR policy as a process in which those same victims become 'convinced' that they are incapable of doing anything significant. As a result, the elite conclude that the victims must be 'guided' by the state's intelligentsia (2003: p.202). These assumptions that are continually exhibited by Kenyan politicians reveal the fundamental contradiction between human rights and the rule of the law by the victim on the one hand, and state nationalism and elite consciousness on the other. This leads to the 'filtering' of a set of human rights and justice that does not strengthen the post-conflict elite's positions. This brings my next evaluations to the entire ICC's operation in general.

D – Lessons that ICC Should Learn from Kenya

The final month of 2014 finally came an unceremonious conclusion when the ICC's Chief Prosecutor announced its case against Kenyatta was too weak to proceed. Since the collapse of the most politically-sexy case of the Kenyan President of Kenyatta, some commentators highlights how the Chief Prosecutor's anticipated move revealed the obstructive investigations launched by the ICC and reinforced the supranational court's subjugation to the world politics, and how the success story of Kenyatta won the 2013 elections and defied the ICC served an example quashed an ICC's first attempt to try a head of the state (Lynch, 2014a; 2014c). In

recent to this progress only confirmed the author's interactions with the IDPs (Chapter 4) and two lessons could be indicated here:

Firstly, ICC has in the past played safe by targeting only one side (mostly non-state actors), the ICC should wonder whether they need to stop targeting the both sides (the state and non-state actors) of a conflict. There is a little evidence to deny the selectivity of the ICC's justice. While most debates focused on the selectivity based on regions (Africa versus other regions), the reality of selectivity is mostly based on the situation preferred or reinforced the status quo of the state actor, rather than prosecuting the state itself. To this date, the active five of the ICC's interventions are either invited by the state or prosecuting mainly on the warlords; Uganda, the Democratic Republic of Congo, the Central African Republic, Ivory Coast and Mali. Besides issuing the warrant of arrest on Sudanese President of Bashir (2005) and Libyan late President Gadhafi (2011), Kenyan President of Kenyatta is the only case against the state ever attempted by the ICC.

Secondly, the ICC had been under immense pressures to counter the popular depicted perceptions that it was a court that mete out selective justice and always sided with the government or the UN Security Council. As a result, the ICC's Prosecutor decided to target the state leaders in Kenya in the name of justice against impunity. Additionally to that, the recent development of the Kenyatta's case, have shown that it may triggers future chaos in the nation, especially when Kenyatta's political allied during the 2013 election and his vice-President, William Ruto remained secured in full trial, unless the unlikely event of weak evidence of the prosecutorial team against him as well. The heavy interactions between law

and politics exhibited in the ICC's curious interactions with Kenya, when both opposing politicians during the 2007 elections joined political coalition that secured the 2013 election's trophy, resulting a remarkable twist of fate, Kenya now had both president and vice-president charged by the ICC (Bosco, 2014).

Many remained wonders how both infamous local Kenyan politicians have successfully crafted a narrative that pitted the ICC and its supporters among many of the Africa and international civil societies and victims as neocolonial tools being wielded by the powerful West against a vulnerable developing countries. As such future research is needed:

- What is the likely factor that motivates ICC's preference to investigate the non-state rather than the state actor?
- Could the heavily focused on the non-state actor defined the success story of the international justice per se?
- To what extend, the ICC intervention on the local peace process or on-going conflict triggers difficulties in prosecuting the head of the states?
- What are the likely chances of improving the court to meet its positive feedbacks from the victims?
- Should and would the ICC's focused on the state actors improved the court' positive feedback among the global human rights activists?
- And finally, compared to other criminal indictees, why some of the ICC's indictees have successfully quashed their ICC cases with the rhetorical language of neo-imperialism?

Nevertheless, the ICC has been left battered and bruised. The open secret is that many within the court were quietly relieved that the case had collapsed and they could finally move on. But there is a danger in drawing the wrong lesson from the court's intervention in Kenya. There is a risk that the prosecutorial team will look at itself and its record and say: 'We tried to target both sides and we got burned. Let's not do that again.' It may be understandable that, for reasons of ensuring cooperation and enforcing arrest warrants, the ICC must be selective in who it targets for prosecution. But such pragmatism does not make it excusable. For international justice to be— and be perceived to be—legitimate, it must be impartial. When both sides of a given war have committed atrocities (which, of course, is the case in virtually all conflicts), that means targeting both sides for prosecution.

Yes, the move to open an investigation *proprio motu* was audacious. Yes, the way the investigations were built deserves severe criticism and require introspection. Yes, the ICC got burned – politically and legally. But, no, the court should not revert back to the easy approach of siding with powerful actors and selectively targeting the enemies of governments and UNSC member-states. For that, it is important for us to highlights on the shortcomings of the system of criminality conditioned by the ICC's operation next.

E – System of Criminality, The Victim's Rights and Transversal Dissent

My reading within the secondary literature have confirmed my understanding upon the way the ICC operated have confirmed the normative ideas that the punishment of a perpetrator of crimes against humanity is a precondition for delivering justice to victims, and is a critical component of the transformation of war-torn societies into democracies (Teitel, 2000: p.25).

This transformation is affected so that a similar pattern of systematic abuse of human rights can be prevented from displaying itself in the future.

There have been extensive discussions about the system of criminality in the ICC's current proceedings; there is an ongoing debate surrounding the legality and viability of the focus on crimes committed by an individual, instead of collective accountability (for a useful discussion, see Nollkaemper and Wilt, 2009b). The predominant focus on the big fish marks a clear development that has occurred in various ad-hoc tribunals since the 1990s, in their attempts to redefine and expand the prosecution of international war crimes to include atrocities committed during internal armed conflict (Haye, 2008: p.380). Before the trials at the International Criminal Tribunal for Former Republic of Yugoslavia (ICTY), it was nearly impossible to apply the principle of individual accountability, and eventually the legacy of the ICTY crystallised the focus on individual accountability. Additionally, the increase in this focus on individual accountability was catalysed by the establishment of the Rome Statute (p.381).

However, some have raised concerns that the focus on the big fish may obscure the distinction between international and national crimes (White, 2009: p.318). Indeed, when Ethiopian Prime Minister Meles Zenawi voiced his reservations about the ICC, he unintentionally acknowledged that prosecution of an individual leader like Slobodan Milosevic is substantially different from an individual being tried for an ordinary crime by a municipal court (Stacy, 2010: p.86). As such, the atrocities committed in international crimes required a distinct understanding of legality, and a system of criminality that differs from that applied to

domestic or ordinary crime. This is owing to the systematic and political nature of international crime (p.87).

In criticising the ICC's focus on individual accountability, Nigel White has pointed out the reluctance of legal positivism to use the term of 'state crime', since the state (sovereignty) is a legal entity, and crime cannot be associated with the legal operation of the state by virtue of being unlawful (2009: p.328). However, international concerns about the unspeakable crimes addressed by the Nuremberg and Tokyo trials have challenged the idea that the state apparatus is incapable of addressing war crimes (p.329). In theory, the danger of the ICC's recent focus on the big fish in Kenya is that the state's alleged crimes do not meet the threshold requirement for crimes against humanity; the prosecutor has not identified a specific policy that was systematically undertaken by the state (on behalf of the state actors) during the specified period of violence that can be connected to the crimes for which Kenyatta and Ruto are accused (see International Criminal Court., 2011). The challenge appears even more gigantic when one compares the ICC's proceedings in Kenya with the Nuremberg trials or the proceedings of the ICTY. The 'system criminality' of the ICC (based on individual accountability) may challenge our understanding that it was possible for the unspeakable crimes to have been committed by the suspects without them having utilised state apparatus to orchestrate post-election violence.

Realising such legal limitations (in indicting Kenyatta), the ICC's Office of the Prosecutor (OTP) has added new forms of evidence to establish that Kenyatta (as a central part of the state system) has committed the crime of deliberately failing to prevent state security forces

from committing violence against unarmed civilians. By 2013, the OTP has also used evidence that he held secret meetings in order to mobilise the *Mungiki* criminal sect to displace supporters of the opposition (see Chapter 4: Table 4.2).

The most legally daunting aspect of the OTP's attempt to convince the judges is its sole focus on individual accountability, and the fact that it has not identified a specific policy that was systematically implemented by the state. Consequently, it is nearly impossible to draw parallels with the crimes of genocide addressed by the Nuremberg trials, and to establish a case for crimes against humanity if the prosecution of crimes committed during post-election violence focuses solely on individual accountability. It is this focus which makes it even harder to identify the systematic planning of such crimes by the state (collective entity). As such, other commentators have suggested the prosecution of international crimes should focus on both individual and collective accountabilities (Nollkaemper and Wilt, 2009a: p.395). Indeed, Tony Lang's analysis of international justice suggests that a third court be established (in addition to the existing ICJ and ICC) to try crimes committed by non-state actors and terrorist groups (2008: p.138).

Yet this reasoning does not take into account that in Kenya, politicians nor the ICC itself (or any suggested court) display any substantive willingness to address the victims' collective rights to justice (fieldwork note no. 4, Rift Valley, April 7, 2013).

The interaction between liberal peacebuilding and transitional justice (Chapter 2) emphasises the objectification of the victim through human rights, humanitarian laws and criminal laws

(Garcia-Godos and Sriram, 2013: p.5). While studies of public international law have identified the legal obligation of the victim to testify, the current legal focus on individual responsibility has limited the scope of the victim, and generally only concerns victims who choose to testify at the ICC's proceedings (Pena and Carayon, 2013: p.534). As I have discussed in the Chapter 4, the IDPs have continued to be victimised, and are treated as objects of evidence by the ICC. They are also subject to political manipulation at the hands of the national elite, which affects their livelihood at the camps. As such, they expressed their rejection of the ICC by voting for the ICC's suspects in the 2013 election.

Indeed, the shift from optimism to cynicism was quantitatively documented by one of the polls: Ipsos-Synovate (2013a). In November 2011 and February 2012, Ipsos-Synovate concluded that the majority of Kenyans would not vote for the ICC suspects in the 2013 election, and that they firmly believed that justice could only be delivered by the ICC (Ipsos-Synovate, 2011; 2012). However, after the 2013 election, the number of Kenyans who were optimistic about the ICC had dropped from 50% in November 2012 to 35% by July 2013 (Ipsos-Synovate, 2013b). The respondents mostly cited Kenyatta's official position as president as the main reason for why they believed that his ICC trial would be continuously delayed and eventually dropped. 15% of the respondents also believed that Kenyatta would win his case at the ICC.

While the limited size of the sample collected by this quantitative survey prevents us from establishing a precise trend in IDPs' attitudes towards the ICC, the shifting preferences of the Kenyan population reveal the most important aspect of the ICC's proceedings. The extensive

documentation of the ICC's proceedings has only confirmed the dominant perspective that justice, as it is understood by the ICC and the Kenyan political class, does not accord with the IDPs' understanding of it. In such instances, the IDPs' everyday narratives and acts of resistance represent a crucial bottom-up perspective on justice- and reconciliation-seeking policy.

Indeed, Roland Beiker has argued the necessity of making 'conceptual breaks with the existing understanding of global politics [in order] to recognize trans-territorial dissident practices and to comprehend the processes through which they exert human agency' (2000: p.273). The top-down approach, or the 'long tradition of conceptualizing global politics in state centric ways', have reinforced the binary distinction between international and national domains in a region where such a distinction is highly contested (p.273). As a result, various agencies have become 'unrecognized, or at least untheorized' (p.273). Only the shifting of the analysis of global politics from a top-down to a bottom-up perspective makes it possible to identify the 'transversal site of contestation' in which 'one's investigative gaze must be channeled...more on various forms of connections, resistances, identity formations and other political flows that transgress the spatial givenness of global politics' (p.274).

Given that the nature of the African state (Chapter 3) has proven itself to be unreachable to marginalised IDPs (see also Thomson, 2013b), it is suggested here that their everyday narratives and acts of resistance should be read as an alternative political trajectory for the state. These narratives and acts of resistance can help us to determine how the state came into being, as a result of the power relations and ideological apparatus of the policies implemented

by the international and national elite (Chapter 3). In the context of Kenya's state-society relations, the IDPs' various responses display a language of resistance and rejection, which is not only counter-productive to the justice- and reconciliation-seeking policy, but also to the ICC's proceedings. It also weakens the ruling class' power position, in that the victims' acts of resistance revealed the ruling class's hidden agenda of politicisation in its national debate (Mueller, 2014: p.13). These acts of resistance also challenged the ICC's vague narrative of justice and peace for the victims (Brown and Raddatz, 2014: p.8), which taught the *wananchi* to be wiser in their dealings with the Kenyan ruling class and individual members of the ICC.

F- The Important of the IDP on ICC Proceedings: The Everyday Resistance

Throughout this thesis analysis, I have also discovers the idea of justice became essentially obsolete. The predominant narratives were about Kenya or the entire African Union establishments versus the ICC. Yet few asked the fundamental question: how will justice be served for the dead and displaced victims from the 2008 crisis?

Throughout my analysis within this thesis, I have hinted the answer by phrasing the title of my thesis in the form of question: justice without punishment? Six years after the violence and left 1200 dead and 300, 000 IDPs, only one murder has been investigated and there is no indication of other international crimes committed by the small and medium level of the thousands were committed will ever be investigated, or the perpetrators will be brought to justice. In this partial justice sequence, justice and reconciliation was not a goal for those who perished or remained displaced, rather justice could only be served if the politically targeted of the big fish—Kenyatta and Ruto—were left alone (interview with IDP no. 53, Rift Valley, March 7, 2013). It won't be surprised to many displaced victims that the collapse of

Kenyatta's case is the pretext of the Kenyan ruling class that justice has been delivered. Two instructive lessons can be drawn from the focused on the IDPs upon transitional justice:

I) Different Levels of Understanding of Justice Validates the Unsuccessful Political Reconciliation

Firstly, the IDPs' narratives confirm the reality that, while power-sharing puts an end to direct violence, the actual process of social repair and restituting and reintegrating the victims and survivors into society has not yet been completed. Sanctioning transitional justice mechanisms within such negative peace conditions—or normalising criminal offences in the everyday life of Kenyans—may increase the difficulty of identifying specific evidence for successful reconciliation. Furthermore, it creates difficulties in determining the ability of transitional justice mechanisms to establish sustainable peace. While the 2008 post-election violence was not repeated in the aftermath of the 2013 election, the transitional justice mechanisms did not succeed in establishing political reconciliation, peaceful democratic consolidation or in putting an end to ethnic chauvinism. Consequently, this has renewed the prospect of future unrest, especially if such unrest is connected to the same factor of impunity that the ICC and TJRC are currently attempting to combat (Cheeseman et al., 2014).

Given the ICC's ongoing proceedings and the TJRC's ineffectual attempts to award reparations, it is impossible to assert that both transitional justice mechanisms have fulfilled their specific mandates, and the mid- and long-term objectives specified by the KNDR agreement. Certainly, it is true that violence has been prevented, the electoral body has been reformed, the new constitution and tougher laws for unethical media reports have been

promulgated and devolution (instead of the centralization of power in the hands of one single, imperial president) has been effected.

However, those who cite such institutional examples as evidence that justice and reconciliation has taken its course ignore the complex roles of neo-patrimonialism, informal norms and political collusion that have governed the political dynamics of modern Kenya. The 2013 elections were far from being free and fair, but they were definitely peaceful. However, such peacefulness was not owing to the ICC's interventions, but to Kenyatta and Ruto's strategic calculations of mobilising their ethnic powerhouse against Rahila Odinga's blatant support for the ICC. Exposing the nature of transitional justice mechanisms through the power relations and ideological apparatus on which they are based uncovers the continuing pervasion of neo-patrimonial logic.

Even after five years since the establishment of these mechanisms, there is still more room for the issuing of recognisable mandates for justice and reconciliation. It can be concluded that, while the interaction between transitional justice and peacebuilding is provided with a nexus by epistemological assumptions about victimhood, transitional justice and peacebuilding can also become nemeses when their hybrid practices are not connected to the victim.

II) Between International and Local: The 'Distance' between Transitional Justice and Victims

The overwhelming politicisation of justice in Kenya has ensured that, while there has been an abundance of sophisticated scholarly publications on transitional justice over the past two decades, these publications have suffered from a tendency to follow a univariate direction; this

has led to the disconnection of the discussion of transitional justice options from the local contingency of the case study (Ramirez-Barat, 2014). The IDPs' perspectives on which this thesis primarily focuses indicate two main assumptions concerning the administration of justice: the idea that justice delayed is justice denied, and the idea that justice hurried is justice buried. The first assumption is displayed in the ruling class' shifting of preference between the ICC and the TJRC; the second relates to the immediate period following the release of the TJRC's report, in which no substantive targets for administering justice in the form of retribution, restoration, restitution and reparation have been reached (interview with IDP no. 55, Rift Valley, March 8, 2013).

While this thesis agrees with Godfrey Musila in his assertion that the ICC needs to develop a comprehensive template for restorative justice that is derived from Article 21 of the Rome Statute, this process would be open to the more practical danger of putting forward an institutional design for global restorative justice without substantive methods implementation. In Kenya, the ruling class dominated the proceedings of both the ICC and the TJRC in their focus on the ICC's suspects, but not on the reconciliation needs of the entire political community. These transitional justice mechanisms were seen as responsible for creating a 'political boundary' between the state and its citizens, as well as a boundary between those in power and those who were systematically victimised by the state (interview with IDP no. 46, Rift Valley, March 6, 2013).

Those who were directly affected by the violence did not feel that they were being 'treated' by the measures, because the measures were ethnically and politically structured. It is equally

important to recognise the danger of establishing a binary dichotomy between victim and perpetrator in focusing exclusively on the victims' perspectives. Additionally, the TJRC's extensive coverage of victims' testimonials has been criticised by many IDPs for not actually being accurate (interview with IDP no. 36, Rift Valley, April 4, 2013).

However, the process of identifying what 'truth' means to the IDPs is beyond the scope of this thesis, and requires more relevant methods (such as those of ethnography) and a longer research period. The IDPs' narratives also informed us about the limitations of the ICC in delivering broader forms of justice. This confirms Godfrey Musila's thesis regarding the inability of the ICC to protect victims in Africa (2009b). This inability is partly owing to the TJRC's difficulty in complying with the Kenyan government's demands for restitution and reparation, especially in relation to the land resettlement scheme, which discuss next.

G- Lessons from TJRC to Future Truth Commissions

Throughout my observation of the TJRC, and the way its interacted with the displaced victims have revealed that while the transitional justice at the national level bridged the gap between the humanitarian concerns that guided the thrust of the Kenya's truth commission and the IDPs, yet the IDPs do not received enough concrete benefits from the commission's final report, and transitional justice institutions could sometime hinders their actual reparations when its operations undermined the national authority. Interestingly while Kenya facing the complexity of TJRC's operations, the UN Human Rights Council established the mandate of the *Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence by the pursuant to Resolution 18/7* (see Greiff, 2012).

In short this latest global human rights developments signified the judicial and non-judicial concepts of transitional justice institution, namely the truth commission and the ICC as the practical strategy for confronting with the past violations of human rights. Furthermore, through the Special Rapporteur periodical reports for the 2012 and 2013 in accordance o the above resolution submitted to the UN General Assembly and Human Rights Council, the term ‘transitional justice’ is used to describe the comprehensive package of addressing the past violations of human rights (Hansen, 2013b: p.320). In this regards, the overall transitional justice options debated in Kenya resonates very well with the UN aspirations of confronting the past violations of human rights (Asaala and Dicker, 2013b: p.134). In producing its periodic report, the Special Rapporteur have visited many war-torn societies, including Uruguay, Guatemala, Guinea, Nepal, Tunisia and Spain with pending visits for Brazil, Ivory Coast, Democratic republic of Congo Indonesia, Rwanda and Kenya. Given the misleading trade off between peace and justice in Kenya, a visit to Kenya are highly welcome by most civil societies (Asaala and Dicker, 2013a: p.324). This is mainly because the Special Rapporteur’s mandate that stresses that transitional justice are ‘neither meant to be “soft form of justice” nor a means of pursuing the aim of political reconciliation by passing the implementation of the four scopes its mandate, namely ‘truth’, ‘justice’, ‘reparation’ and ‘guarantees of non-recurrence of human rights violation’ (The U.N, 2012).

However, lessons for future truth commissions should consider the situations from Kenya. In this respect, despite the concerted efforts of the TJRC in producing the final report, it lacks three major factors that spanned the overall timeframes of its operations; firstly, the legitimacy

and local ownership factors at the initial stage of its formation, the political wills of the government in mediating or conflicting its jurisdiction during its operation, and finally, the civil society's active and constructive engagements in its overall evaluations (Asaala and Dicker, 2013a: p.330). For that future research is required to investigate:

- whether the aforementioned three factors could be the likely variables in measuring the effectiveness of the truth commission;
- under what likely and unlikely environments, the politically conditions of certain truth commissions are successful from other commissions;
- what is the likely chances of success story for combining the TJRC works with the ICC operations within politically constrained environments;
- does the participation various local agencies and non-state actors produces for greater results of the final report's implementation;
- how to measure the agents/actors interactions with the truth commissions and finally;
- under what likely and unlikely environments fosters the civil society's greater, critical and constructive engagements with the truth commission.

Nevertheless, the above has more or less hinted the future navigation for research in relations to the IDPs. However, more investigations required for understanding the relationship between the IDP and truth commission, which discussed next.

H – The Displacement Agendas within Transitional Justice Research

The IDPs' perspectives challenge the narratives of justice and reconciliation as they are

understood by the state. The IDPs' non-state perspectives provide rare new insights into the disproportionate focus on the domains of state security in African politics. As Suren Pillay (2013: p.75.) has noted, the predominant approach of studying African politics from the perspective of state security domains has increased the difficulty of gauging the public's political imagination of the concept of community. As a result, there is a dearth of studies that examine the lives of African heterogeneous societies within displaced camps.

I) Legal Framework for 'Durable Solutions': Bridging the Gaps between Transitional Justice and Displacement Issues

In discussing the significant of the *Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence by the pursuant to Resolution 18/7*, the above sections have also illustrated how the idea of protecting individuals has come to play a central role in both liberal peacebuilding and transitional justice concerned with ameliorating human sufferings and bettering the human condition. For that, the long standing concept of protection as the obligation of the state with regards to their citizens have been progressively expanded by post-Cold War developments. The right-based approaches have structured the humanitarian conditions of displaced individuals which specified that states are not merely expected but obligated to protect the lives, integrity, property, welfare and dignity of citizens within their jurisdictions, namely the sovereign responsibility (Williams, 2012: pp.85-86). Coupled together with the notion of human security as adopted by the UN General Assembly's 2005 doctrine of Responsibility to Protect (R2P), the codification of the ICC's Rome Statute in 2003 and the *Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence by the pursuant to Resolution 18/7* represents the extent to which the assertion of human rights confirmed the central ideas of reparations and restitutions

for the displaced victims. As a result, the *2001 UN Guidelines for the IDPs*' convictions of rights to restitution of housing, land and property or in the form of physical and legal restoration of wrongfully taken assets in the wake civilian displacements was largely understood by state parties as a practical necessity for reversing the atrocity effects of ethnic cleansing, genocide and mass violence (Bradley, 2012: p.197).

Given the sophisticated legalisation of the aforementioned various international documents, there is a reasonably substantive grounds for the future truth commissions to follow the similar footsteps of the Kenya's TJRC. In the final 2013 report, TJRC recommended the government to respect its legal obligation as a rectifier of the 2001 *UN Guiding Principles for IDPs*, as well as calling the government to take necessary steps to domesticating the regional and sub-regional legal frameworks that governed the protection of the displaced victims (see T.J.R.C., 2013: Vol. 4.). The Kenya's new constitutions have enshrined the specific bill of rights and the 2012's IDP Act, but I believe that there is still a gap between such grand legal frameworks with the actual short- and long- terms plans for providing the reparations and restitutions of the IDPs (interview with IDP no. 11, Rift Valley, February 11, 2012). As such, I would suggest that the TJRC's recognition of the 'durable solutions' identified in the *UN Guiding Principles for the IDPs* should be accompanied with the pending adoptions of the sub-regional legal frameworks of the IDP, as well simultaneously implemented through the adoption of the *2005 Pinheiro Principles*¹⁰⁹ that posited a general guideline for the actual operation of the

¹⁰⁹ The Pinheiro Principles contains full text of an important new international standard which outlines the rights of refugees and displaced persons to return not only to their countries when they see fit to do so, but to their original homes and lands as well. The Pinheiro Principles are the culmination of more than a decade of international and local activities in support of the emerging right to housing and property restitution as a core remedy to displacement, see (Centre on Housing Rights and Evictions. , 2010)

restitutions of land, housing and property for the IDPs. This not only directly touched on the land needs of the Kenyan IDPs, but also pushed for speedy momentum for building more robust framework. Yet I have observed, neither sets of recommendations have been acted upon.

In contrast, the IDPs' needs for restitution and reparation have been replaced with immediate patronage rewards during the 2013 election (Chapter 5). Since May 2008, the government has launched various operations in order to pressure the IDPs to resettle, including cutting off their food and water and applying political pressure instead of providing socio-economic support (Klopp and Sheekh, 2011). This obviously violated the country's legal ratification of the regional pact on Security, Stability and Development, which is supposed to guide the government's policy in relation to displaced victims, upholding a protocol of protection that ensures that IDPs are successfully reintegrated and rehabilitated back into society (Klopp and Sheekh., 2008: p.19).

While this thesis explicitly focused on the IDPs from the 2008 crisis, there are urgent attentions for mitigating the increasing displacements issues in the long-term (interview with IDP no. 37, Rift Valley, April 7, 2012). It was unfortunate that, while the country had endorsed such a regional treaty and promulgated the 2012 Act of IDP, the 2008 crisis did not elicit a heightened degree of transnational pressure on the government to fulfil its responsibilities of rehabilitating and resettling the IDPs.

The current living conditions of the post-election violence IDPs illustrated in this thesis suggest the Kenyan government's violation of Section 5, Principle 28 (1) of the above Act, since the government's politicisation of the ICC and TJRC's proceedings indicate that it has violated its primary duty to establish conditions that allow the IDPs to resettle with 'safety' and 'dignity' (Republic of Kenya, 2012: p.2245). In addition, the government's attempt to politicise both the ICC and the TJRC has 'arbitrarily deprived' the IDPs of their collective rights to reparation, restitution, rehabilitation and resettlement, which violates section 2, Principles 10 (2) and (3) respectively (p.2255).

In the second half of 2012, about 116,000 people were newly displaced due to violence resulting from a combination of ethnic, political and economic factors (United Nations Office for the Coordination of Humanitarian Affairs, 2014). Following a 2010 constitutional reform, in 2013 power was devolved from the central to the local level. Election-related violence is also being decentralised. Devolution offers opportunities but it also carries risks, as communities compete against each other for representation (particularly for the post of governor). In northern Kenya, the days prior to the March 2013 general election saw a significant movement of population from Ethiopia into Kenya, which inflamed clan tensions in Mandera, resulting in the temporary displacement of 7,000 people (The United Nations Children's Funds., 2013). Before the 2013 elections, cattle's rustling was often used as a cover for political violence. Pastoralists in various locations confirmed both an increase in raids and the political nature of the violence (interview with local pastoralist, Rift Valley, March 1, 2013). However, with the exception of some serious localised incidents, the elections turned out to be largely peaceful (see also Greiner, 2013).

There have been new displacements since UNHCR released its January 2013 estimate. In 2013, 55,000 were reported to be newly displaced as a result of political, inter-communal and resource-based violence particularly in the counties of Marsabit and Mandera (United Nations Office for the Coordination of Humanitarian Affairs, 2013). Over 2,800 people were reported to be newly displaced due to inter-ethnic violence along the border separating the counties of Kericho and Kisumu in March 2014 (Kenya Red Cross., 2014). Tens of thousands more have been displaced by disasters. In 2013, floods destroyed homes, property and livelihoods throughout the country and displaced nearly 180,300 people, though most of them returned after a short time (United Nations Office for the Coordination of Humanitarian Affairs, 2013). This number of people newly displaced by floods is an increase over the 2012 figure of 97,600 people (Editor., 2014).

For that, improving the availability of comprehensive data on IDPs disaggregated by age, gender and location (including those in urban settings) is paramount. In 2012, Chaloka Beyani, the UN Special Rapporteur on the human rights of IDPs urged the government to develop accurate, comprehensive and disaggregated data-collection and database/registration systems inclusive of all categories of IDPs, and to undertake at the earliest opportunity a comprehensive data-collection exercise with a view to considering how best to identify, assess and respond to IDPs' assistance, protection and durable-solution needs, with particular attention to vulnerable groups (Beyani, 2012). The great majority of IDPs in Kenya does not live in camps (interview with IDP no. 20, Rift Valley, February 17, 2012). For example, only about 4,700 of the more than 34,000 displaced by violence in Tana River County in 2012/13

gathered in camps (Internal Displacement Monitoring Centre, 2014). The vast majority fled to various villages and towns within Tana River and the neighbouring counties of Kilifi, Mombasa and Lamu.

II) The IDP, Citizenship and Human Rights

By observing the livelihoods of the IDPs, it was evidence that the mechanisms for promoting national unity and for healing ethnic tensions in the wake of the electoral crisis have proven to be vague and vastly disconnected from those who remain vulnerable and displaced (interview with IDP no. 33, Rift Valley, March 16, 2012). The current living conditions of the IDPs, and the default necessity of their moving to the slums after the camps had been closed by the government, fit very well with Hannah Arendt's descriptions of displaced citizens or subjects who live 'beyond the legal existence of the state or the state's authority', in that violent conflict becomes an enduring force that shapes the placement of an individual human being in relation to his or her state of security (Oman, 2010).

In this regards, the scholarly literature on citizenship and the nation-state in Africa has little to say about IDPs, as its tend to be perceived as either citizens who have been officially disenfranchised or economic migrants. Undoubtedly forced IDP's flows, largely reflect the failure of the nation-building project wherein the pursuit of national identity is subordinated by elite competition and social group exclusion. Although technically citizens, thanks to humanitarian intervention, IDPs tend to be subjected to the same disempowering forces as refugees.

As such the focused on the IDPs here revealed the diversity politics in relations to the question of citizenship and subjectivity in the twenty first century of Africa (see also Daley, 2013). The diversity of Kenya's plural societies speak tremendously to the state power, resulting the construction of modern state based on the ideas of inclusivity and exclusivity of certain groups while inherited the repressive functions of the colonial state system (Chapter 3). Having inherited the various competing social groups in the early period of post-independence Kenya, nation building were seen as a precondition for sovereignty and the promotion of differences, whether on the basis of class, race, ethnicity or gender, what termed by Foucault as 'biopolitics' (see Foucault, 1997a). Such diversity often maintained through violence, economic disparity and political segregations resulting unequal treatments of individual rights and claims to humanity (Anderson and Rolandsen, 2014: p.545). This brings the whole ideas of unequal political and economic treatments of various ethnic groups in Kenya before major crises to different projections of citizenship and shaped the current treatment of the IDPs.

In this matter, Mahmood Mamdani's *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) could be cited to draw our attention to the bifurcated colonial state with its different legal system. In settler societies only whites settlers and urbanised Africans were recognised as citizens under modern Roman law; the rest of the population were subjects and governed by customary law. Independent African states used nation building as a means of defining their modernity and exerting sovereignty over their citizens. According to Herbst, citizenship laws in Africa became salient only after independence, with the 'creation of the concept of the foreigner' (see 2000b). Independent states were relatively successful in promoting distinctive nationalist traits, which, however,

started to lose meaning during the economic crisis of the 1980s and the imposition of structural adjustment.

More recently scholars have noted the turn away from nation building in African states and the fiercely contested nature of local territorial identity, often with appeals to colonial history for definition. This trend has been attributed to two tendencies: the neoliberal retreat of the state from the economy and public service delivery, and the emergence of competitive politics resulting from democratisation (Daley, 2013: pp.900-901). Neoliberalism helped to undermine citizenship rights, despite claims that citizens can be empowered through new governance mechanisms and to certain extends constraining the transitional justice institutions in Kenya to empower the IDPs through restitutions and reparations.

Nevertheless, the precarity faced by IDPs cannot be separated from ongoing debates about citizenship in Kenya and Africa generally (interview with IDP no. 32, Rift Valley, March 16, 2012). Under neo-liberalism states no longer subscribe to public service obligations to citizens, much less to non-citizens. Despite peace agreements, successive elections, power sharing, transitional justice and donor-funded programmes of reconstruction and stabilisation, those people forcedly displaced from their homes tend to lose their rights of belonging—social and political citizenship—especially as their ‘otherness’ prevents them from articulating their entitlements, at a time when access is being linked to existential claims of indigeneity or whatever criteria are deemed appropriate by the powerful national elites (see also Lynch, 2011a). Displacement has, therefore, placed ordinary people in seemingly insurmountable situations of social and economic marginality that are not resolved by repatriation and

integration into host societies (interview with IDP no. 26, Rift Valley, March 8, 2012).

Considering such an understanding, this thesis illuminates the divergent critical understandings of Kenyan state and its complex relation to external actors, as well as the subjective and plural understanding of socio-legal terms like ‘justice’, ‘peace’ and ‘reconciliation’ in the everyday life of *wananchi*. Simultaneously however, the relationship between Kenyan government and its displaced citizens is complicated by the existence of international humanitarian regimes and human rights documents that rectified through the domestication of these documents in Kenya’s municipal laws (Internal Displacement Monitoring Centre, 2012). While these documents priorities the respect of the state sovereignty and its legitimacy in assisting their own IDPs and consolidating the control over their hinterland borders, the state’s unequal treatments of every citizens have not evidently fixed the social conviction among the IDPs that they belongs to the state national territory (see Lonsdale, 2008). Humanitarian convictions of transitional justice and liberal peacebuilding, though of critical importance at times of emergency, has unexpected and adverse outcomes in the long term, some of which may be counter to effective integration or reintegration. Transitional justice processes should be viewed as being complicit in the reconfiguration of citizenship and identity that is taking place in the country after the 2008 crisis.

For that, the establishment of forms of peace, justice and reconciliation that are satisfactory to the IDPs remains a formidable task, since the government is rapidly closing the IDP camps without addressing the IDPs needs for rehabilitation and restitution (interview with HRW officer no. 2, Nairobi, February 28, 2012). The existence of the IDP camps has become a

‘permanent feature’ of Kenya’s recent history (Waki, 2009; p.271). These violations challenge the prevailing political perception among the Kenyan ruling class that the IDPs are the responsibility of institutions that provide international humanitarian relief, rather than the state. This situation has also increased the conviction among ordinary Kenyans that the proliferation in the number of displaced populations and illegal settlements over the last five years has created a scenario in which the outbreak of political violence seems probable, as a means of silencing any voices of dissent that continue to demand that leaders be brought to justice for their atrocities (interview with IDP no. 25, Rift Valley, March 8, 2012).

Thus far, the timeframe required has been vaguely specified using the simple premise that where there is a beginning there must also be an end or ‘closure’ to this process, so that lessons can be inferred and applied as conflict resolution models in future attempts to prevent the outbreak of political violence. As Harvey Weinstein (2011: p.1) argues, the word ‘closure’ has become ‘ubiquitous’ in any discussion of legal mechanisms being sanctioned after violent conflict has ceased. Weinstein also cites the proliferation of land disputes following the TRC’s report in post-apartheid South Africa, as evidence of the danger of romanticising justice and reconciliation efforts and measuring them in terms of closure.

If there is a primary theme in concluding the analysis of justice and reconciliation in Kenya, it is crucial to recognise the ‘myth of closure’ initiated by the KNDR policy. The proliferation of studies on international intervention in countries that have undergone democratisations has increased the pressure on policymakers and academics to measure the specific timeframe required to implement the net effect of transitional justice as part of liberal peacebuilding. This

pressure has been heightened by the astronomical cost of establishing tribunals and truth commissions, which are either fully sponsored by the taxpayer's money or by international donors and humanitarian funds.

On the basis of narratives of residents of the IDP camps, it can be deduced here that, while large-scale post-election violence has not been repeated during the 2013 election, the current situation of 'stabilised hostility' or 'negative peace' has contributed to the relative dearth of conclusive evidence as to what defines a 'successful transitional justice prescription'. There is more disagreement rather than agreement regarding whether to opt for quantitative or qualitative methods in studying transitional justice. The empirical evidence obtained from quantitative method of examining the positive and negative causal effects of transitional justice mechanisms is still insufficient (Olsen et al., 2010a: p.15).

However, the single case approach and qualitative methods adopted by this thesis in analysing transitional justice in Kenya cannot be easily applied to other countries (Thoms et al., 2010: p.352). While the installation of the TJRC was inspired by South Africa's TRC, it has proven to be tricky to apply in the context of Kenya. As a result of such methodological limitations, any ambitious attempts to implement successful justice- and reconciliation-seeking policy in Kenya have remained politically unsuccessful. If the current administration under the stewardship of Kenyatta can put an end to the recurring cycle of violence and displacement, then there may be a real prospect of introducing more forms of justice and reconciliation.

Appendix 1: List of Interviews (According to the Date)

	Social Status/Designation	Location	Date	Page of Citation
1	IDP (no. 1)	Rift Valley, Kenya	February 9, 2009	66, 332
2	IDP (no. 2)	Rift Valley, Kenya	February 10, 2009	92, 333
3	IDP (no. 3)	Rift Valley, Kenya	February 15, 2009	15
4	IDP (no. 4)	Rift Valley, Kenya	February 20, 2009	93
5	IDP (no. 5)	Rift Valley, Kenya	February 21, 2009	93, 332
6	IDP (no. 6)	Rift Valley, Kenya	February 22, 2009	96
7	IDP (no. 7)	Rift Valley, Kenya	February 23, 2009	7
8	IDP (no. 8)	Rift Valley, Kenya	February 24, 2009	2
9	IDP (no. 9)	Rift Valley, Kenya	February 25, 2009	96
10	Lecturer (no.1), University of Nairobi	Nairobi, Kenya	March 18, 2009	6
11	Lecturer (no. 2) University of Nairobi	Nairobi, Kenya	March 18, 2009	261
12	Lecturer (no. 3) US International University	Nairobi, Kenya	March 23, 2009	6
13	KAF officer (no.1)	Geneva, Switzerland	November 25, 2010	143, 276
14	KAF officer (no. 2)	Geneva, Switzerland	November 26, 2010	186, 245
15	ECCC observer (no. 1)	Paris, France	November 27, 2010	172-3
16	ECCC observer (no.2)	Paris, France	November 28, 2010	172
15	ECCC observer (no.3)	Paris, France	November 29, 2010	172
16	IJR officer	Cape Town, South Africa	July 15, 2011	8, 185, 258, 276,
17	Local lawyer	Cairo, Egypt	July 22, 2011	173
18	Lecturer (no. 4) The American University	Cairo, Egypt	July 23, 2011	34
19	TJRC officer (no.1)	Nairobi, Kenya	February 5, 2012	19, 137, 278
20	TJRC officer (no.2)	Nairobi, Kenya	February 6, 2012	279
21	TJRC officer (no.3)	Nairobi, Kenya	February 6,	164

			2012	
22	TJRC officer (no. 4)	Nairobi, Kenya	February 7, 2012	186, 367
23	CIC officer (no.1)	Nairobi, Kenya	February 7, 2012	8
24	CIC officer (no. 2)	Nairobi, Kenya	February 7, 2012	77
25	Lecturer (no. 5), University of Nairobi	Nairobi, Kenya	February 7, 2012	38
26	IDP (no. 10)	Rift Valley, Kenya	February 7, 2012	72, 193
27	IDP (no. 11)	Rift Valley, Kenya	February 8, 2012	95
28	IDP (no. 12)	Rift Valley, Kenya	February 9, 2012	96
29	IDP (no. 13)	Rift Valley, Kenya	February 10, 2012	393
30	IDP (no. 14)	Rift Valley, Kenya	February 11, 2012	459
31	IDP (no. 15)	Rift Valley, Kenya	February 12, 2012	441
32	IDP (no. 16)	Rift Valley, Kenya	February 13, 2012	333
33	IDP (no. 17)	Rift, Valley, Kenya	February 14, 2012	80, 333
34	USAID officer	Nairobi, Kenya	February 15, 2012	71, 393
35	IDP (no. 18)	Rift Valley, Kenya	February 15, 2012	96, 329
36	IDP (no. 19)	Rift Valley, Kenya	February 16, 2012	87, 883, 333
37	IDP (no. 20)	Rift Valley, Kenya	February 17, 2012	462
38	IDP (no. 21)	Rift Valley, Kenya	February 18, 2012	333
39	Local businessman	Mombasa, Kenya	February 20, 2012	266-67, 327, 334
40	City Council	Nairobi, Kenya	February 20, 2012	411
41	Retired Judge (1)	Mombasa, Kenya	February 21, 2012	40, 162,
42	Smallholding farmer (no.1)	Nairobi, Kenya	February 24, 2012	321, 332
43	Smallholding farmer (no.2)	Rift Valley, Kenya	February 25, 2012	270
44	ICTJ officer (no.1)	Nairobi, Kenya	February 26, 2012	81, 270, 404
45	ICTJ officer (no.2)	Nairobi, Kenya	February 27, 2012	201

46	HRW officer (no.1)	Nairobi, Kenya	February 27, 2012	95, 336
47	HRW officer (no. 2)	Nairobi, Kenya	February 28, 2012	466
48	KNHRC officer (no.1)	Nairobi, Kenya	February 28, 2012	269
49	IDP (no. 22)	Rift Valley, Kenya	March 2, 2012	271
50	KNHRC officer (no.2)	Nairobi, Kenya	March 2, 2012	117, 271
51	Former Mungiki member	Nairobi, Kenya	March 2, 2012	231
52	IDP (no. 23)	Rift Valley, Kenya	March 2, 2012	336
53	US Embassy officer	Nairobi, Kenya	March 4, 2012	189-90, 231, 274, 280
54	Canadian High Commission officer	Nairobi, Kenya	March 6, 2012	274, 322
55	IDP (no. 24)	Rift Valley, Kenya	March 7, 2012	201-2, 267, 334
56	IDP (no. 25)	Rift Valley, Kenya	March 8, 2012	466
57	IDP (no. 26)	Rift Valley, Kenya	March 8, 2012	465
58	IDP (no. 27)	Rift Valley, Kenya	March 8, 2012	341
59	IDP (no. 28)	Nairobi, Kenya	March 8, 2012	155, 336
60	IDP (no 29)	Nairobi, Kenya	March 8, 2012	164
61	Street Musician, (IDP no. 30)	Nairobi Kenya	March 9, 2012	193
62	NPI officer	Nairobi, Kenya	March 10, 2012	272, 396
63	Local MP (no.1)	Central Province, Kenya	March 12, 2012	231, 273
64	Local MP (no.2)	Rift Valley, Kenya	March 14, 2012	155, 190, 409-10
65	IDP (no. 31)	Rift Valley, Kenya	March 14, 2012	183
66	Retired Judge (2)	Nairobi, Kenya	March 15, 2012	39, 170, 344
67	IDP (no. 32)	Rift Valley, Kenya	March 16, 2012	565
68	IDP (no. 33)	Rift Valley, Kenya	March 16, 2012	463
69	Kenyan Government officer (no.1)	Nairobi, Kenya	March 17, 2012	123, 155
70	UNDP officer	Nairobi, Kenya	March 17, 2012	193
71	Matatu driver (IDP no. 34)	Eldoret, Kenya	March 17, 2012	193

72	Kenyan Government officer (no.2)	Nairobi, Kenya	March 18, 2012	274, 350
73	Ministry of Finance, Kenya	Nairobi, Kenya	March 24, 2012	272
74	Local squatter (no. 35)	Nairobi, Kenya	April 3, 2012	273
75	IDP (no. 36)	Rift Valley, Kenya	April 4, 2012	455
76	IDP (no. 37)	Rift Valley, Kenya	April 7, 2012	460
77	IDP (no. 38)	Rift Valley, Kenya	April 10, 2012	332
78	AU officer (no. 1)	Addis Ababa, Ethiopia	April 14, 2012	120, 159, 173, 185, 262
79	AU officer (no.2)	Addis Ababa, Ethiopia	April 15, 2012	122, 275, 277
80	ICC officer	The Hague, Netherland	February 12, 2013	118, 129-30, 329, 339
81	Local pastoralist	Rift Valley, Kenya	March 1, 2013	461
82	KNHRC officer (no. 3)	Nairobi, Kenya	March 1, 2013	320, 335, 340, 342, 351
83	IDP (no. 39)	Rift Valley, Kenya	March 2, 2013	201, 346
84	IDP (no. 40)	Rift Valley, Kenya	March 2, 2013	301
85	IDP (no. 41)	Rift Valley, Kenya	March 2, 2013	304, 305, 346
86	IDP (no. 42)	Rift Valley, Kenya	March 2, 2013	305
87	IDP (no. 43)	Nairobi, Kenya	March 3, 2013	305, 346
88	IDP (no. 44)	Rift Valley, Kenya	March 6, 2013	327
89	IDP (no. 45)	Nairobi, Kenya	March 6, 2013	331
100	IDP (no. 46)	Rift Valley, Kenya	March 6, 2013	454
101	IDP (no. 47)	Rift Valley, Kenya	March 6, 2013	344
102	IDP (no. 48)	Rift Valley, Kenya	March 6, 2013	347
103	IDP (no. 49)	Rift Valley, Kenya	March 7, 2013	349
104	IDP (no. 50)	Rift Valley, Kenya	March 7, 2013	349
105	IDP (no. 51)	Rift Valley, Kenya	March 7, 2013	330
106	IDP (no. 52)	Rift Valley, Kenya	March 7, 2013	345, 350

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107	IDP (no. 53)	Rift Valley, Kenya	March 7, 2013	451
108	IDP (no. 54)	Rift Valley, Kenya	March 8, 2013	329
109	IDP (no. 55)	Rift Valley, Kenya	March 8, 2013	454
110	IDP (no. 56)	Rift Valley, Kenya	March 8, 2013	337-338
111	IDP (no. 57)	Rift Valley, Kenya	March 8, 2013	337
112	IDP (no. 58)	Rift Valley, Kenya	March 9, 2013	338
113	IDP (no. 59)	Rift Valley, Kenya	March 9, 2013	338
114	IDP (no. 60)	Rift Valley, Kenya	March 9, 2013	342, 343
115	IDP (no. 61)	Rift Valley, Kenya	March 9, 2013	331
116	IDP (no. 62)	Rift Valley, Kenya	March 10, 2013	329
117	IDP (no. 63)	Rift Valley, Kenya	March 10, 2013	440
118	IDP (no. 64)	Rift Valley, Kenya	March 10, 2013	344
119	IDP (no. 65)	Rift Valley, Kenya	March 10, 2013	338
120	IDP (no. 66)	Rift Valley, Kenya	March 10, 2013	344
121	IDP (no. 67)	Rift Valley, Kenya	March 10, 2013	347
122	IDP (no. 68)	Rift Valley, Kenya	March 11, 2013	350
123	IDP (no. 69)	Rift Valley, Kenya	March 11, 2013	347
124	IDP (no. 70)	Rift Valley, Kenya	March 11, 2013	347
125	IDP (no. 71)	Rift Valley, Kenya	March 12, 2013	438
126	IDP (no. 72)	Rift Valley, Kenya	March 12, 2013	347
127	IDP (no. 73)	Rift Valley, Kenya	March 12, 2013	347
128	IDP (no. 74)	Rift Valley, Kenya	March 12, 2013	348
129	IDP (no. 75)	Rift Valley, Kenya	March 13, 2013	360
130	IDP (no. 76)	Rift Valley, Kenya	March 14, 2013	390

131	IDP (no. 77)	Rift Valley, Kenya	March 14, 2013	390
132	IDP (no. 78)	Rift Valley, Kenya	March 14, 2013	395
133	IDP (no. 79)	Rift Valley, Kenya	March 14, 2013	401
134	IDP (no. 80)	Rift Valley, Kenya	March 14, 2013	403
135	IDP (no. 81)	Rift Valley, Kenya	March 15, 2013	405
136	IDP (no. 82)	Rift Valley, Kenya	March 15, 2013	406
137	IDP (no. 83)	Rift Valley, Kenya	March 15, 2013	432
138	IDP (no. 84)	Rift Valley, Kenya	March 16, 2013	408
139	IDP (no. 85)	Rift Valley, Kenya	March 16, 2013	408
140	IDP (no. 86)	Rift Valley, Kenya	March 16, 2013	408
141	IDP (no. 87)	Rift Valley, Kenya	March 17, 2013	410
142	IDP (no. 88)	Rift Valley, Kenya	March 17, 2013	411
143	IDP (no. 89)	Rift Valley, Kenya	March 17, 2013	412
144	IDP (no. 90)	Rift Valley, Kenya	March 17, 2013	412
145	IDP (no. 91)	Rift Valley, Kenya	March 18, 2013	412
146	IDP (no. 92)	Rift Valley, Kenya	March 18, 2013	412
147	IDP (no. 93)	Rift Valley, Kenya	March 19, 2013	413
148	IDP (no. 94)	Rift Valley, Kenya	March 19, 2013	416
149	IDP (no. 95)	Rift Valley, Kenya	March 19, 2013	417
150	IDP (no. 96)	Rift Valley, Kenya	March 20, 2013	418
152	IDP (no. 97)	Rift Valley, Kenya	March 20, 2013	418
153	IDP (no. 98)	Rift Valley, Kenya	March 21, 2013	430
154	IDP (no. 99)	Rift Valley, Kenya	March 21, 2013	430
155	IDP (no. 100)	Rift Valley, Kenya	March 22, 2013	65
156	IDP (no. 102)	Rift Valley,	March 22,	59

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157	IDP (no.103)	Rift Valley, Kenya	March 22, 2013	434

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